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IN THE

United States Supreme Court

HAROLD LEVINSON ASSOCIATES, INC.,
A Corporation, and EDWARD BERRO,
Individually and as President,

Petitioners,

v.

ELAINE L. CHAO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer that has provided extra compensation to its employees under the Fair Labor Standards Act, 29 U.S.C. § 207(h)(2), by paying a premium rate for overtime hours under 29 U.S.C. § 207(e)(5), (6) or (7) may offset its overpayment against any overtime owed under the Act in accordance with the terms of the Act and the Department of Labor Field Operations Handbook, regardless of whether the overtime liability arose in the same work week or work period as the overpayment, as the Courts of Appeals in the Eleventh and Federal Circuits have held, or whether the overpayment may be offset against overtime liability only when the overpayment was made in the same work week or work period that the overtime liability was incurred, as the Courts of Appeals in the Sixth and Seventh Circuits have held?

2. Whether the failure to permit an offset of extra compensation paid by an employer to its employees under the Act except when the extra compensation was paid in the same work week or work period that the overtime liability was incurred constitutes an enhanced penalty that is not authorized by statute?

3. Whether the Court can disregard the terms of a stipulation between the parties?

4. Whether the utilization of average overtime figures from a different period in the company's history, which are not annualized and are not adjusted either for the company's growth or the increase in the company's volume and sales is a violation of this Court's requirement that the Secretary's calculation of

unpaid overtime must be "a matter of just and reasonable inference"?

PARTIES TO THE PROCEEDING

Petitioner Harold Levinson Associates, Inc. ("HLA") is a wholesaler and distributor of goods, primarily tobacco products, to convenience stores. Petitioner Edward Berro ("Berro") is the President of HLA.

Respondent Elaine L. Chao is the Secretary of the United States Department of Labor. The Honorable Elaine L. Chao was substituted for her predecessor, the Honorable Alexis M. Herman, during the appellate proceedings pursuant to Fed. R. App. P. 43 (c)(2). Respondent commenced this action against HLA and Berro alleging violations of the Fair Labor Standards Act.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

HLA is a privately owned corporation with its principal place of business in Farmingdale, New York. It has no parent corporation and no publicly held company owns 10% or more of the stock in HLA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AND DIRECTIVES INVOLVED	1
STATEMENT OF THE CASE	4
A. Factual Background	4
B. Procedural Background	6
1. The Initial District Court Decision	7
2. The Decision on Appeal	10
3. The Trial on Remand	12
4. The Decision on Remand	13
5. The Appeal of the Decision on Remand	14
REASONS FOR GRANTING THE WRIT	15

Page

POINT I

THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE STATUTE ALLOWS AN EMPLOYER TO OFFSET EXTRA COMPENSATION PAID ACROSS WORK PERIODS AGAINST OVERTIME LIABILITIES OWED .. 17

A. The Plain Language of the Statute Precludes the Imposition of a Work Period Limitation For Offset of Extra Overtime Compensation Paid by an Employer 17

B. A Failure to Credit Extra Overtime Compensation Constitutes An Enhanced Penalty That Is Not Recognized or Authorized By Statute 22

C. The Work Period Limitation Is Particularly Inappropriate Here Where the Measure of Damages Is Averaged Across Multiple Work Periods 23

D. The Court Cannot Disregard the Stipulation Entered Into by the Parties 24

POINT II

THE COURTS BELOW HAVE BLATANTLY IGNORED THIS COURT'S DIRECTIVE TO CALCULATE UNPAID OVERTIME AS A MATTER OF JUST AND REASONABLE INFERENCE 26

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

Abbey v. City of Jackson,
883 F. Supp. 181 (E.D. Mich. 1995) 20

Alexander v. United States,
32 F.3d 1571 (Fed. Cir. 1994)..... 20

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 17, 26, 28

Barnhart v. Sigmon Coal Co., Inc.,
534 U.S. 438 (2002)..... 18-19

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) ... 21

Christensen v. Harris Cty., Texas,
529 U.S. 576 (2000)..... 20-21

Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032
(6th Cir. 1991)..... 26

Herman v. Fabri Centers of America, Inc.,
308 F.3d 580 (6th Cir. 2002),
cert. denied, 537 U.S. 1245 (2003).....18, 20, 21

Howard v. City of Springfield, Illinois,
274 F.3d 1141 (7th Cir. 2001)..... 20, 21

Kohlheim v. Glynn County, Ga.,
915 F.2d 1473 (11th Cir. 1990) 20

Lanza v. Sugarland Run Homeowners Assoc., Inc., 97 F. Supp. 2d 737 (E.D. Va. 2000) 22

	Page
Nolan v. City of Chicago, 125 F. Supp. 2d 324 (N.D. Ill. 2000)	20
Russello v. United States, 464 U.S. 16 (1983)	19
Singer v. City of Waco, Texas, 324 F.3d 813 (5th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004)	20
Snapp v. Unlimited Concepts, 208 F.3d 928 (11th Cir. 2000), *cert. denied*, 532 U.S. 975 (2001)	22-23
Zuchowicz v. United States, 140 F.3d 381 (2d Cir. 1998)	25
Statutes and Regulations	
28 U.S.C. § 1254(1)	1
Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*	6
29 U.S.C. § 207(a)	19
29 U.S.C. § 207(b)	19
29 U.S.C. § 207(e)	2, 20
29 U.S.C. § 207(f)	19
29 U.S.C. § 207(g)	19
29 U.S.C. § 207(h)	1, 11, 14, 17, 18, 20, 22
29 U.S.C. § 207(k)	20
29 U.S.C. § 216(b)	3, 22, 23
29 C.F.R. § 778.106	4, 22

Page

Other Authorities

Section 32e03, Secretary's Wage and Hours
Field Operations Handbook.....3, 17-18

Page

Appendices

Summary Order of the U.S. Court of Appeals for the Second Circuit, dated February 23, 2005 .... 1a

Findings of Fact, Conclusions of Law, and Judgment for Plaintiff on Remand, of the U.S. District Court, Southern District of New York, dated December 30, 2003 ..... 6a

Summary Order of the U.S. Court of Appeals for the Second Circuit, dated May 22, 2002 ..... 15a

Findings of Fact, Conclusions of Law, and Judgment for Plaintiff, of the U.S. District Court, Southern District of New York, dated April 20, 2001..... 23a

OPINIONS BELOW

Petitioners Harold Levinson Associates, Inc. and Edward Berro respectfully petition for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit, reported at 121 Fed. Appx. 918, 2005 WL 428787 (2d Cir. (N.Y.) 2005) (reproduced at Appx. A at 1a), which affirmed the decision of the district court on remand. The decision of the district court on remand, entitled Findings of Fact, Conclusions of Law, and Judgment for Plaintiff on Remand, dated December 30, 2003 was not reported (reproduced at Appx. A at 6a). The remand was directed by the United States Court of Appeals for the Second Circuit in its Summary Order, reported at 37 Fed. Appx. 19, 2002 WL 1032708 (2d Cir. (N.Y.) 2002) (reproduced at Appx. A at 15a), which Order affirmed in part, and vacated and remanded in part the district court's Findings of Fact, Conclusions of Law and Judgment for Plaintiff dated April 20, 2001, reported at 2001 WL 34088698 (E.D.N.Y. 2001) (reproduced at Appx. A at 23a).

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was entered on February 23, 2005. (*See* Appx. A at 1a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND DIRECTIVES INVOLVED

The statute involved is Section 207(h)(2) of the Fair Labor Standards Act of 1938 ("FLSA" or the "Act"), 29 U.S.C. § 207(h), which provides:

> (h) Extra compensation creditable toward overtime compensation

> **(2)** Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

as well as Subsection (e) of Section 207, which provides, in relevant part:

> (e) "Regular rate" defined
>
> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> **(5)** extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;
>
> **(6)** extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
>
> **(7)** extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regu-

> lar workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek . . .

Also involved is Section 32e03 of the DOL Field Operations Handbook (3/24/67), which provides in relevant part:

> Offset of premium payments for excessive hours. Where premium rates are paid for hours in excess of a valid hours standard, the amount of the premium payment may be offset against statutory OT compensation due, regardless of whether such extra compensation is provided by a premium rate of 1⅓, 1½, double, or some other multiple of the non-OT rate of pay.

In addition, 29 U.S.C. § 216, is at issue here. The statute states, in relevant part:

> § 216. Penalties
>
> (b) Damages; right of action; attorney's fees and costs; termination of right of action
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. ... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The regulations at issue include 29 C.F.R. § 778.106:

> Time of payment.
>
> There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in § 778.303. For a discussion of overtime payments due because of increases by way of bonuses, *see* § 778.209.

STATEMENT OF THE CASE

A. Factual Background

During the period May 1992 through December 1994, Harold Levinson Associates, Inc. ("HLA" or the "Company") employed approximately 150 employees. The employees and HLA were parties to an industry negotiated collective bargaining agreement establishing an hourly wage for each non-exempt employee. Each employee was compensated for overtime hours above 40 hours per week at the overtime rate of one and one-half times his or her regular rate.

HLA maintained payroll records for each employee that recorded the union wage rate, the number of regular hours worked, and the number of overtime hours worked. From May 1992 through September 1993, the payroll records were recorded by hand, on work schedules and daily attendance records, and HLA utilized Paychex for its payroll system (the "PCX period"). In October 1993, HLA changed to an ADP payroll system and a time clock was installed; the ADP system remained in place for the remainder of the period in issue, up to and including December 1994 (the "ADP period"). It was undisputed, and the Pre-trial Order for the initial trial provided, that the time clock installed during the ADP period accurately reflected the actual hours worked by the HLA employees during that period. The delineation of two separate periods in the overall time period at issue was an artificial one: the two periods were distinguished simply on the basis of which payroll company was used and the method used to record the number of hours worked by each employee.

Based upon the accurate hours recorded by the time clock during the ADP period and HLA's uncontested payroll records for that period, HLA paid its employees extra overtime compensation in the amount of $529,000.00 in excess of the time and a half hourly overtime wages due to its employees under the collective bargaining agreement.[1]

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[1] The payment of extra overtime compensation arose as a result of the unionization of HLA's workforce prior to the period in issue. It became apparent that the employees were likely to earn less money in overtime payments under the union contract than they had been earning previously. Accordingly, HLA's President advised the employees that the Company would pay extra overtime compensation to account for any shortfall between the overtime compensation due to the employees earned under the collective bargaining agreement and the amount of overtime payments they had earned previously.

B. Procedural Background

The Department of Labor ("DOL") commenced this action against HLA on or about May 1995 under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, alleging that HLA failed to pay overtime to its employees during the period of May 1992 through December 1994. DOL sought compensatory and liquidated damages.

The instant investigation and audit by DOL was commenced in the absence of a single complaint from any employee that they had not been fully paid for overtime hours worked.

Although DOL's theory of the case changed repeatedly during the course of the action, including DOL abandoning its original theory upon which it had commenced the action, *i.e.*, that HLA had paid no overtime wages when the facts showed that HLA had paid approximately $3 million in overtime wages during the period at issue, at trial DOL contended, among other things, that (1) as to the PCX period, HLA's hand-recorded payroll records were inaccurate and unreliable and that HLA did not pay its employees for all of the overtime that they worked during the PCX period; and (2) as to the ADP period, when, as DOL concedes, the use of the time clock resulted in an accurate accounting of the amount of overtime worked by HLA's employees, that three salaried employees were not managerial employees exempt from overtime payment and thus were due overtime wages, as well as some modest, random and diffuse discrepancies totaling eleven thousand ($11,000) dollars.

In response, HLA argued that: (1) the hand recorded records maintained during the PCX period *as well as* the time clock records kept during the ADP period were accurate; (2) it had paid all overtime wages due to its employees; (3) that during the ADP period it had paid its employees five hundred

and twenty-nine thousand ($529,000) dollars in extra overtime compensation; (4) that even if additional overtime wages were due to its employees, it is entitled to an offset of its payment of $529,000 in extra overtime compensation paid to its employees against any sums found to be due to its employees; and (5) that average overtime incurred in the ADP period was higher than in the PCX period as the Company had grown substantially in terms of sales and product volume between 1992 and 1994.

1. The Initial District Court Decision

In its decision the District Court found that HLA was liable for willfully failing to pay overtime pursuant to the FLSA. In calculating damages, the District Court adopted, in full, DOL's methodology in the calculation of overtime. DOL's methodology relied entirely upon the accuracy of the time clock records maintained by HLA during the ADP period, which DOL had stipulated correctly reflected the hours actually worked by HLA's employees during that period.

The bulk of DOL's claim for damages was for overtime wages due during the PCX period. DOL claimed, and the District Court agreed, that the Company's manual records maintained during that period were unreliable, based on DOL's dubious averaging methodology, and that, as a result, those hours had to be recreated. Based upon the non-specific testimony of former employees, which was flatly contradicted by their own concededly accurate, stipulated time records in the ADP period,[2] that they worked essentially the same amount

[2] The time records indicated that each employee's overtime fluctuated from week to week, as the Court of Appeals acknowledged (Appx. A at 20a); however, that Court did not note the incongruity between this fact and the District Court's baseless finding that HLA's employees "generally worked similar hours during these two periods." (Appx. A at 19a)

of overtime during the PCX and ADP periods, DOL recreated the amount of overtime worked during the PCX period based upon average overtime hours worked during the ADP period, as reflected in the stipulated time clock records. To obtain a weekly average, DOL took the total amount of overtime worked by the employees during the ADP period, added it together and divided by the number of weeks in that period (or the number of weeks worked by that employee, if less than the full period). This was done on an individual basis for employees who worked both during the PCX and ADP periods, and on a departmental basis for employees who worked during the PCX period but not the ADP period.[3] The ADP averages were not adjusted to reflect (1) an annual period, (2) seasonal variances in overtime work, or (3) changes in the volume of work required to be performed by each employee brought about by the almost fifty (50%) per cent growth in sales and product volume.

The weekly average of overtime derived from the ADP period was used to determine whether there was uncompensated overtime incurred during the PCX period. However, DOL did not perform the same averaging calculation for the overtime hours in the PCX period when it applied the averages derived from the ADP period. Rather, for each employee it looked at HLA's records for the PCX period on a week-by-week basis: if the compensated overtime hours for that week in the PCX period were less than the average number of overtime hours during the ADP period, DOL made a claim for the difference. All weeks in the PCX period in which

[3] DOL's calculations resulted in two figures: (1) for employees who were employed during both periods, the average number of overtime hours worked per week by each employee in the ADP period, and (2) for employees who were not employed during the ADP period, the average number of overtime hours worked per week by employees in each department.

the Company paid overtime hours above the ADP average for that employee were excluded. None of the overpayments were credited to offset any short-fall for the weeks that were below the ADP average; moreover, no effort was made by DOL to determine when the hours were actually worked for which the overtime was paid. The District Court awarded $412,326.00 in overtime payments for the PCX period.

In the ADP period, the Court found that three salaried employees were not managers excluded from payment of overtime, and thus they were awarded overtime for the ADP period, notwithstanding that the actual compensation they received as salaries exceeded the compensation they would have received as hourly employees fully paid at premium rates for all the hours they claimed to have worked. In addition, there were certain minor discrepancies in the overtime payments of employees who were paid biweekly. Accordingly, the District Court awarded $91,758.50 in overtime pay for the ADP period.

The District Court did not address HLA's argument that any liability for unpaid overtime should be offset against HLA's payment of $529,000 in extra overtime compensation to its employees. To the extent that it could be found to have considered it at all, it was only in the context of HLA's argument that it had a valid prepayment plan in place whereby it had agreed to provide its employees with a consistent weekly wage, so that its employees would not be subject to the fluctuation in income that would result from the fluctuation in the amount of overtime worked. In this regard, the District Court only found that there was no "explicit agreement" between the Company and its employees required for a valid prepayment plan. In rejecting the existence of a prepayment plan, the Court did not consider how the extra compensation paid by HLA to its employees should be credited.

2. The Decision on Appeal

On appeal, the Court of Appeals affirmed the District Court's determination as to liability and to the award of damages for the ADP time period, but found that the District Court's method of computing overtime for the PCX period lacked foundation inasmuch as its comparison of the average hours in the ADP period to the actual hours in the PCX period was improper:

> We are unable, however, to accept the importation of the average weekly hours worked for the ADP period as the assumed number of hours worked for each given week during the PCX period. The time-clock records demonstrate that hours tended to fluctuate from one week to the next. Given this reality and given that many of the derived PCX hours are based on departmental rather than individual averages, we find that actual hours worked by each individual employee for each specific PCX week cannot be derived as a matter of reasonable inference. Because damages are awarded for weeks during which the derived hours exceeded the payroll record hours, but not offset by weeks during which the payroll records exceed the derived hours, assuming that in each week of the PCX period each employee work precisely the *average* number of hours worked unfairly penalizes the defendants.

(Appx. A at 19a-20a) (emphasis in original).

Defendants objected to the use of the ADP figures as a foundation for the calculation of damages in the PCX period because the two periods were not comparable: the company had grown by almost 50% between 1992 and 1994, and, further, the ADP period included two holiday seasons, rather than the one season in the PCX period. The result was an inflation in the overtime averages for the ADP period uti-

lized in establishing damages in the PCX period. The Court of Appeals acknowledged that defendants' objections to the wholesale importation of the ADP averages, without any statistical adjustment of those averages to account for the growth of the company between the PCX period and the ADP period, and without an annualizing of the figures, "is not without some force." Still, the Court of Appeals did not remand for calculation on these grounds, and as a consequence the failure to take these statistical factors into account perpetuated the harm that the Court of Appeals found in the first instance, *i.e.*, a calculation of damages that "unfairly penalizes the defendants." (Appx. A at 20a)

As noted above, the Court of Appeals recognized that when utilizing averages, the failure to apply an offset in the PCX period of any underpayment against weeks in which there was an overpayment "unfairly penalizes defendants."[4] (Appx. A at 20a) Turning to the analogous issue of whether the payment of extra compensation pursuant to 29 U.S.C. 207(h) may be offset against any liability for unpaid overtime, the Court of Appeals recognized that there is a split in authority on this issue. However, it sidestepped this issue, finding instead that "this case does not involve payments that satisfy the requirements of that provision." (Appx. A at 21a) The Court of Appeals based this determination on the unsupportable rationale that HLA's overpayment of $529,000 in extra compensation is "largely based on nothing more than assumptions that were stipulated for trial, and provide no basis for a credit." (Appx. A at 21a) However, the stipulation set forth in the pre-

[4] In holding that an averaging offset was required, the Court of Appeals stated that it so held not because defendants were entitled to such offset as a matter of law, but rather, because the failure to offset the under and overpayments constituted a lack of foundation for the calculation of overtime in the PCX period. (Appx. A at 21a)

trial order was simply a reflection of conceded fact entered into in order to narrow the issues to be contested.

The Court of Appeals remanded this action to the District Court for recalculation of damages during the PCX period.

3. The Trial on Remand

On remand, the District Court held a bench trial in accordance with the decision of the Court of Appeals. Defendants presented fact and expert witnesses who addressed the calculation of overtime hours worked during the course of the PCX period based upon the ADP period time clock figures to which the parties had stipulated. The defendants' witnesses testified that there is no statistical significance to the separation of the overall time period into these two sub-periods; in fact, the division of the period at issue into these two randomized subcategories creates a great risk of distortion if the figures are not adjusted statistically to account for certain factors.

Defendants' witnesses testified that in making statistical comparisons, you must use the same periods in order to arrive at a valid result. Therefore, they annualized the data, "which is a common practice" utilized by economists, but which DOL did not do, and used it as a basis from which to derive the appropriate figures for the PCX period. In addition defendants' expert looked at the demand variables, *i.e.*, the change in volume of sales from year to year and the change in the amount of product handled from year to year, which in this case was cartons of cigarettes, and concluded that consideration of the demand variables was necessary to calculate the overtime hours for the preceding years of 1992 and 1993: "because sales [and] cartons were rising over a period of time, it became clear when we started to do our analysis that the man hours worked to meet that demand must also rise." Defendants' expert then calculated the

change in sales volume in each of the three years, and the change in numbers of cartons handled in those years, to establish discount rates for the overtime required to meet the demand in those years. When the discount based upon sales volume was applied during the PCX period, there was unpaid overtime in the maximum amount of $65,000. When the discount based upon carton count was applied, there was unpaid overtime in the maximum amount of $19,000.

Defendants' expert also reviewed the monies HLA paid in overtime compensation and determined that the company had overpaid $540,000.00 and that it had underpaid $11,000.00, resulting in a net overpayment of $529,000.00 paid to the employees in extra overtime compensation. The expert testified that as an accountant adhering to generally accepted accounting principles, there was no basis for excluding an overpayment that occurred during an audit period.

4. The Decision on Remand

Defendants' expert testimony regarding the economic models and statistical analyses of the period data that should be used to obtain reasonable estimates of the actual overtime worked by the HLA employees during the PCX period, including annualizing the data from the ADP period and applying the appropriate discounts to take into account the change in the growth in the company and the increase in sales and volume over the more than 2½ year period at issue, was unrebutted by DOL. Nonetheless, the District Court rejected the expert testimony, attesting to the need to apply a coherent economic and statistical analysis to the calculations to be performed, inferring, *sua sponte* and without a shred of evidence in the record, that a 25-45% increase in sales volume would not require an increase in the hours required to perform the necessary manual labor at issue: "The court reasonably

infers that employees performing assembly, loading, and delivery tasks may well be able to handle much greater volume without an increase in their hours at work or the number of employees performing the task." Instead, the District Court again adopted plaintiff's calculations for the PCX period, which had been modified to average the PCX period overtime payments and compare them to the average overtime worked in the ADP period according to the stipulated time clock records.

The District Court also dismissed the testimony regarding HLA's $529,000 payment of extra compensation for overtime hours on the spurious grounds that the testifying expert "had little understanding of the law governing required prepayment plans" when in fact he did not offer any testimony and made no reference to prepayment plans.

5. The Appeal of the Decision on Remand

Defendants appealed the remand decision to the Court of Appeals. The Court of Appeals denied defendants' request for an offset of the $529,000 overpayment against any alleged liability owed, but did not address the merits of the issue as to whether an offset is available for extra compensation paid pursuant to 207(h); rather the Court of Appeals held, without analysis, that defendants "fail to establish that the $529,000 in question was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2)." Moreover, the Court of Appeals implausibly held that defendants' economic and statistical evidence did not rebut the "reasonableness of the formula this Court previously settled on."

REASONS FOR GRANTING THE WRIT

A. It is in the public interest that employers be encouraged to confer non-obligatory benefits that add to the economic stability of their employees, without being penalized by the imposition of bureaucratic minefields, the justification for which cannot be found in statute, regulation or DOL guideline. Thus, assuming *arguendo*, without conceding application to the instant case, that an employer fails to fully pay for every overtime hour[5], there appears to be no basis for any policy that suggests that if an employer has actually put more money in an employee's pocket for overtime than the employee is entitled to in accordance with the governing collective bargaining agreement, and documents same, that such additional money should simply get lost because it was not paid in the same time period, or that said employer should be challenged for alleged underpayments arrived at by virtue of an "averaging" process that ignores the science developed for valid averaging.

It is vital that with regard to the administration of the FLSA and the purposes that it was intended to serve that there not develop a bureaucratic approach that exalts form over substance. Such an approach benefits neither the employer who may be inhibited from such acts by concern over incurring an unintended penalty, nor the employee who loses the benefits. It is

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[5] In the instant case the employer acknowledged that every overtime hour was to be compensated at full premium rates; a single set of records was maintained accordingly, which kept a running account of the additional hours and premium payments made therefore. The records were maintained on an employee by employee basis so that an overpayment to one employee did not offset any shortfall to another; virtually all employees had received extra compensation for overtime as reflected in their individual employment records. It is not inapposite to repeat that not a single employee had ever complained that they had not been fully compensated at full premium rates for all overtime hours worked.

ironic that the employer gets a deduction for such payments and the employee pays taxes on said additional money, but the funds have no significance when determining if an underpayment has been made or additional monies are due. Rather, the object should be to encourage employers to provide for their employees to the extent that they are willing and able, while giving full credit in order to encourage such desirable acts. The employees can only benefit and the economy is the better for it.

B. The Courts of Appeals have divided on whether an employer's payment of extra compensation to its employees may be credited across work weeks or work periods to offset liability for overtime wages, or whether any extra compensation paid can only be credited against a liability that arose in the same work period. The situation at issue here is a graphic demonstration of the inequity that can result when an offset is limited to the work period in which the liability was incurred. HLA *actually* paid $529,000 in extra overtime compensation to its employees; now, assuming *arguendo*, that the Secretary's calculations are correct, HLA is being forced to pay almost the same amount a second and third time. This constitutes an enhanced penalty that is not provided by statute. Moreover, this inequity occurs in the face of the Secretary's blatant failure to address this matter and promulgate regulations that would clarify an employer's rights in this area, and in light of the divergent case law that allows an offset in certain circuits and limits it in others. Based upon the plain language of the statute and basic principles of statutory construction, there is no basis for the limitation imposed by certain courts that restricts any offset to a liability that arose in the same work period. However, due to the conflicting approaches taken by different Circuit Courts, and the resultant confusion, this matter should be determined by this Court.

Furthermore, the courts deciding this matter below have blatantly ignored this Court's directives in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), which imposes on Plaintiff the burden to "show the amount and extent of [uncompensated] work as a matter of just and reasonable inference." This Court has not opined on what specific factors constitute "just and reasonable inference," however, the calculations performed in this action should be found to be in violation of this requirement inasmuch as they do not take into account the variety of factors that expert economists and others have found to be crucial to fairly evaluate whether and to what extent an employer, such as HLA here, is liable for unpaid overtime compensation.

POINT I

THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE STATUTE ALLOWS AN EMPLOYER TO OFFSET EXTRA COMPENSATION PAID ACROSS WORK PERIODS AGAINST OVERTIME LIABILITIES OWED

A. The Plain Language of the Statute Precludes the Imposition of a Work Period Limitation For Offset of Extra Overtime Compensation Paid by an Employer

It is well-settled that an employer is entitled to an offset of extra overtime compensation paid against overtime that is owed pursuant to the FLSA. 29 U.S.C. § 207(h). This recognition is expressly incorporated into Secretary's Wage and Hours Field Operations Handbook (the "Handbook") at Section 32e03.[6] Other

[6] Section 32e03 (3/24/67) provides as follows:

Offset of premium payments for excessive hours. Where premium rates are paid for hours in excess of a valid hours standard, the amount of the premium payment may be offset against statutory OT compensation due, regardless of whether such extra compen-

than the provision in the Handbook, however, the Secretary has not promulgated any regulations with respect to this particular issue, despite having notice of divergent applications of this provision. *See, e.g., Herman v. Fabri Centers of America, Inc.*, 308 F.3d 580, 593 (6th Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003). Moreover, it is undisputed that neither the text of the statute, nor the provisions in the Secretary's Handbook, sets forth any work period limitation for the offset of premium payments against overtime compensation due.

In fact, the statute provides that premium payments "shall be creditable" without imposing any time limitation for the application of such credit:

> (h) Extra compensation creditable toward overtime compensation
>
> . . .
>
> (2) Extra compensation paid as described in paragraphs (5), (6) and (7) of subparagraph (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h). In construing the language of the statute to determine whether a work period limitation is applicable, it is important to note that other sections of the FLSA prescribe a workweek as the measure for compensation.

The express inclusion of such language elsewhere in the statute highlights the glaring omission of any such language in this particular section of the statute, 29 U.S.C. § 207(h). This Court has consistently held that if Congress intended that a term should apply to the provision in issue, in this case the workweek limitation for offset of overtime compensation paid, that Congress would have provided it. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002)

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sation is provided by a premium rate of 1⅓, 1½, double, or some other multiple of the non-OT rate of pay.

("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citation omitted).

This is especially true where other parts of the statute expressly include the terminology which is omitted from the section at issue here.[7] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). In this case, Congress' plain omission in this subsection of any work period limitation for the offset of premium payments made against overtime due must be interpreted to mean that Congress intended no such limitation.

Nevertheless, the question has arisen in this and other cases as to whether the offset for extra compensation may be applied only in the same work period that the overtime payments are due, or whether they may be credited across work periods to satisfy FLSA overtime obligations that arose at another time.

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[7] *See, e.g.*, Section 207 (a)(1) ("no employer shall employ any of his employees who in any *workweek* is engaged in commerce or in the production of goods for commerce ... for a *workweek* longer than forty hours ...") (emphasis supplied); Section 207 (a)(2) ("No employer shall employ any of his employees who in an *workweek* is engaged in commerce or in the production of goods for commerce ... and who in such *workweek* is brought within the purview of this subsection ...") (emphasis supplied); Section 207(b) ("No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a *workweek* in excess of that specified in such subsection ...") (emphasis supplied); Section 207(f) ("No employer shall be deemed to have violated subsection (a) of this section by employing an employee for a *workweek* in excess of the maximum *workweek* applicable to such employee ...") (emphasis supplied); Section 207(g) ("No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a *workweek* in excess of the maximum *workweek* applicable to such employee under such subsection ...") (emphasis supplied).

Two divergent lines of cases have developed that take the polar opposite positions on this issue; one line allowing an offset under the statute across work periods, and the other line finding that the statute precludes the application of any offset except in the work period in which the liability was incurred. *Compare Herman v. Fabri-Centers of America, Inc.*, 308 F.3d 580 (6th Cir. 2002) (limiting offset to the work period in which the liability arose); *Howard v. City of Springfield, Illinois*, 274 F.3d 1141 (7th Cir. 2001) (same); *Nolan v. City of Chicago*, 125 F. Supp. 2d 324 (N.D. Ill. 2000) (same); with *Alexander v. United States*, 32 F.3d 1571 (Fed. Cir. 1994) (permitting offset across time periods); *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473 (11th Cir. 1990) (same); *Abbey v. City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995) (same). *See also Singer v. City of Waco, Texas*, 324 F.3d 813 (5th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004) (discussing offset under FLSA for firefighters who are covered by 207(k) rather than 207(h)).

The courts that have allowed an offset of premium payments across pay periods do so based upon the plain reading of the statute. "The FLSA mandates that 'extra' compensation paid by an employer be credited toward overtime compensation due.... [T]he county should be allowed to set-off *all* previously paid overtime premiums, not just those equal to or greater than 1½ times the regular rate, against overtime compensation found to be due and owing during the damages phase of the trial." *Kohlheim v. Glynn County, Ga.*, 915 F.2d at 1481 (emphasis in original). *See also Alexander v. United States*, 32 F.3d at 1577 ("extra compensation paid as described in 29 U.S.C. § 207(e)(5)-(7) 'shall be creditable toward overtime compensation payable'" pursuant to the statute).

Furthermore, this Court has recognized that unless an action is prohibited by the FLSA, the Secretary cannot argue that an employer violated that statute. *Christensen v. Harris Cty.*,

Texas, 529 U.S. 576, 588 (2000). Because there is no prohibition in the statute against crediting premium payments across work periods, and in fact, the statute evidences a clear intent to permit an employer to offset premium payments against unpaid overtime, it cannot be a violation of the FLSA to do so.

There is an inherent inequity in failing to allow the offset across work periods when neither the statute nor the regulations require such a limitation, as the dissenting judges in *Howard* and *Fabri-Centers of America, Inc.* each recognized. In *Fabri-Centers of America, Inc.*, the dissent argued that: "It is unfair for the Secretary of Labor to force an employer to pay the additional amount of $113,313.63 when the statute does not so provide, no regulation has ever been promulgated on the subject, and employers in other states are allowed these premium credits." *Herman v. Fabri-Centers of America, Inc.*, 308 F.3d at 593 (Siler, J., dissenting).[8] Similarly, in *Howard*, Judge Manion dissented to the majority's determination that the City could not offset premium payments across work periods, since "[n]either the provisions of § 207(h)(2) of the FLSA, nor its accompanying regulations, require such a limitation." *Howard*, 274 F.3d at 1149.

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[8] Judge Siler also contended that the Secretary should not be permitted to take advantage of the fact that she has failed to promulgate any regulations that may clarify this issue for employers who must conform to the terms of the FLSA.

> The Department of Labor has for more than ten years known that there was a dispute about the limitations of the premium credits but it has chosen not to attempt to promulgate regulations which would have been given some deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).... If the Secretary wishes for deference, she has the authority to promulgate regulations which can be given deference under *Chevron*.

Fabri-Centers of America, Inc., 308 F.3d at 593-94.

Moreover, the requirement that any offset be limited to a work period restriction is called into question by the regulation promulgated by the Secretary addressing when overtime is required to be paid, 29 C.F.R. § 778.106. In § 778.106, the Secretary notes that: "There is no requirement in the Act that overtime compensation be paid weekly. . . . When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable." This express recognition that overtime may be paid across work periods when necessary lends further support to the determination that the offset provision set forth in § 207(h) is not restricted to the work period in which the liability arose and the failure to credit extra compensation across work periods is an enhanced penalty that is not authorized by statute.

B. A Failure to Credit Extra Overtime Compensation Constitutes An Enhanced Penalty That Is Not Recognized or Authorized By Statute

The FLSA is "designed to compensate the aggrieved employee, not punish the offending employer." *Lanza v. Sugarland Run Homeowners Assoc., Inc.*, 97 F. Supp. 2d 737 (E.D. Va. 2000). Thus, all of the enumerated remedies itemized in § 216(b), 29 U.S.C. § 216(b), which sets forth the damages that may be assessed against an employer that is found to be in violation of the overtime provisions of the FLSA, "are compensatory in nature, designed 'to put the [employee] in the place she would have been absent the employer's misconduct.'" *Lanza*, 97 F. Supp. 2d at 740 (citing *Snapp v. Unlimited Concepts*, 208 F.3d 928, 934 (11th Cir. 2000)[9],

[9] *Snapp* and *Lanza* are instructive as well in the construction of the FLSA. In analyzing § 216(b) for the purpose of determining whether puni-

cert. denied, 532 U.S. 975 (2001)). To prohibit the offset of premium payments previously made by an employer is, in essence, an enhanced penalty punishing the employer, which is not provided by statute. 29 U.S.C. § 216(b). It is also manifest that full payment for overtime hours worked, and actually received by the employees prior to the commencement of any claim or litigation to compel such payments, exhausts the Secretary's authority to compel additional payments for the same hours worked. To hold otherwise would result in an anomaly whereby an employer who pays for more overtime hours than it is obliged to can, as here, find itself liable under the FLSA for failure to pay and then be required to pay the same amount a third time on the basis of "willfulness" for failure to pay the amount it has actually paid. It is respectfully submitted that no statute, especially one that at best is silent, can be interpreted to include a technical minefield that leads to such a result.

C. The Work Period Limitation Is Particularly Inappropriate Here Where The Measure Of Damages Is Averaged Across Multiple Work Periods

The determination that premium payments may be credited only to a work period where overtime is owed is particularly inapposite here. In this case, the Secretary claimed, and the Court agreed, that it was necessary to recalculate the overtime hours HLA's employees allegedly worked during the PCX period versus the amount of overtime compensation they received. To do so, the Secretary urged the use of an averaging methodology; that methodology did not take into account any changes over time in the amount of overtime worked, the growth in the size of the company or the increased volume of business or sales. Thus, she

tive damages are available under that provision, those courts held that the inclusion of punitive provisions in other parts of the statute cannot be imported into this section, since this section does not include such language and clearly intends to provides compensatory remedies only.

used the average amount of overtime worked each week during the ADP period for each employee, if he or she was employed during the PCX period, or for each department, for employees who were not employed during the PCX period, to calculate the amount of overtime claimed to be owed to employees in the PCX period. The district court adopted the Secretary's averaging methodology and applied it to determine the amount of overtime allegedly due to HLA's employees. The Second Circuit agreed, in part, that the Secretary could utilize averages derived from the ADP period to "stand in" for the amount of overtime worked during the PCX period, due to the lack of foundation for the "actual" hours of overtime worked by the employees.

Thus, the calculation of overtime figures for the PCX period does not compensate employees for the actual hours they worked, but is an estimate based upon averages derived from another work period. In order to assess damages, therefore, it is equally appropriate to credit overpayments across work periods, where, as here, estimates of unpaid overtime due is based upon averages (for overtime hours worked) applied across work periods. Thus, HLA is entitled to an offset of premium payments made during the ADP period to damages assessed during the ADP and PCX periods, which together make up the totality of the period under audit.

D. The Court Cannot Disregard The Stipulation Entered Into by the Parties

It was improper for the Courts below to disregard or discount the effect of the stipulation that the Secretary entered into with HLA, whereby it agreed that HLA had paid extra overtime compensation of $529,000 to its employees in excess of the monies due under the collective bargaining agreement for the overtime hours that they had worked. The courts may not ignore that stipulation.[10]

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[10] The Second Circuit rejected HLA's offset application solely on the basis that the calculation was derived from the stipulation between the parties: "The

There is no dispute that HLA paid $529,000.00 in excess premium overtime wages during the ADP period. DOL stipulated, as set forth in the pretrial order, that the time-clock records were accurate and has never disputed that HLA paid these monies to its employees.[11] The stipulation was entered into as part of the process to narrow the issues for trial. Moreover, the DOL needed this stipulation to create a platform from which to launch their averaging gymnastics. Thus DOL's subsequent attempt to evade the effect of this stipulation as it applies to HLA, claiming that the stipulation was "only for the purpose of trial," is of no effect, especially since DOL expressly relies on the accuracy of those records to recreate the amounts allegedly due during the PCX period.

Pretrial stipulations are entered into explicitly "for the purpose of trial." The courts have recognized that it is an "elementary principle of trial practice that once a fact has been agreed to by both parties and, as a result of such agreement has been submitted to the trial court as a proposed finding of fact, it need not be proved at trial. . . . *The purpose of a pre-trial stipulation of this sort is precisely to narrow the scope of trial by eliminating issues that the parties do not dispute.*" *Zuchowicz v. United States*, 140 F.3d 381, 392 (2d Cir. 1998) (emphasis supplied).

Courts encourage parties to enter into stipulations of fact in order to narrow the issues for trial and conserve judicial resources. *Zuchowicz*, 140 F.3d at 392. The stipulating party, who would otherwise submit evidence to prove that fact, relies on the stipulation and foregoes the opportunity to submit evidence

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purported 'overpayments' are largely based on nothing more than assumptions that were stipulated for trial, and provide no basis for a credit." (Appx. A at 21a)

[11] At the trial on remand, DOL disputed the inclusion of certain small sums of money in the overall figure. However, these amounts are *de minimus* and do not affect HLA's right to offset these monies against any damage amounts assessed by the courts below.

to the trier of fact. For that reason, it has been consistently held that courts may not disregard stipulations of fact, which are binding on the court as well as the parties. *See, e.g., Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991) (vacating District Court's finding of fact that contradicted stipulation, holding that "[s]tipulations voluntarily entered into by the parties are binding, both on the District Court and on [the Court of Appeals].").[12]

HLA relied upon the stipulation that it entered into with the Secretary. For the Courts below to ignore that stipulation, and thereby deprive HLA of the opportunity to submit evidence on this matter, would be a manifest injustice. Moreover, it defies credulity to suggest that entering into a stipulation as to that which is concededly true and upon which a defendant based its entire defense can somehow work to the detriment of that party, by denying it the benefits of that stipulated truth. Accordingly, the Courts below were bound by and were required to decide the issues in accordance with the terms of the Stipulation.

POINT II

THE COURTS BELOW HAVE BLATANTLY IGNORED THIS COURT'S DIRECTIVE TO CALCULATE UNPAID OVERTIME AS A MATTER OF JUST AND REASONABLE INFERENCE

This Court has held that plaintiff bears the burden to "show the amount and extent of [uncompensated] work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687. In this instance however, the method chosen by DOL to calculate the amount of allegedly uncompensated work, which was wholly

[12] The Secretary stipulated that the time clock figures for the ADP period were accurate. The Secretary's subsequent adoption of the district court's statements to the contrary is without effect.

endorsed by the district court on remand and affirmed on appeal, has egregiously ignored the direction of this Court and cannot be found to be the result of "just and reasonable inference."

On the first appeal, the Court of Appeals recognized that the methodology urged by the Secretary and utilized by the district court "unfairly penalizes the defendants" (Appx. A at 21a) because it did not utilize a coherent mathematical analysis and therefore noted that the Secretary's "actual computations of weekly hours for the PCX period" suffered from a "lack of foundation." (Appx. A at 21a n.3)

The Secretary's recalculation on remand, and the adoption of such recalculation by the district court and the Court of Appeals, ignored both of the concerns initially expressed by the Court of Appeals and the requirements of this Court: (1) that the Secretary utilize a methodology that does not unfairly penalize defendants; and (2) that the Secretary establish a proper foundation for its computations of weekly hours for the PCX period.

Instead, as HLA submitted on remand, basic statistical and economic analyses of the ADP period figures were required so that their application to the PCX period would be statistically valid for foundational purposes. Principally, HLA's evidence established, as a matter of statistical and economic analysis, that in order to accurately utilize the ADP figures to derive the "average" overtime figures for the PCX period, the information must be broken down into annual periods, and further that changes over time of the workload being performed had to be factored into the determination.

This evidence established that the Secretary's mechanical and unfounded calculations were not reasonable and did not provide the proper foundation that the Court of Appeals ini-

tially found lacking. Rather, as HLA demonstrated, in order to make a reasonable comparison sufficient to fairly apply the ADP figures to the PCX period in accordance with the direction of the Court of Appeals and this Court's rulings, it was necessary to: (1) equalize the time periods being compared, *i.e.*, compare annual figures to each other, and (2) adjust the figures to account for the changes in the variables that affected the amount of work required to be performed and therefore the amount of overtime that was necessary to complete that work. As a result of this analysis, HLA effectively satisfied its burden to rebut the Secretary's calculations "with evidence to negative the reasonableness of the inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687-88.

It is only after the information regarding overtime hours worked is annualized, that it is then possible to determine the average amount of overtime worked by an individual employee on a weekly basis for the year. As HLA's expert testified, annualizing this information helps "smooth out" seasonal variations, such as increased sales and volume in the period between Thanksgiving and the New Year, and avoids the risk of distortion. Moreover, once the information is annualized, other information regarding the company, such as changes in the volume of sales and the quantity of product sold, can be applied to these figures to appropriately adjust them to account for such changes so that a valid comparison can be made.

Defendants' experts performed this necessary analysis and determined the adjustments to the calculated average amount of overtime required to account for the increase in the amount of product being handled and the volume of sales from 1992 through 1994. The benchmark was the amount of overtime worked in 1994, since the parties had stipulated that the time clock records were accurate. The experts then looked at the

change in sales volume between 1994 and 1993 as well as between 1994 and 1992 and determined a percentage of discount to the amount of overtime hours that it would take to perform the work for a lesser volume of business. In a secondary check on these figures, the experts compared the change in the number of cartons of cigarettes sold. The change in this figure was similar to the change in sales volume over the period of time in issue and resulted in similar discount percentages; it is undeniably reliable.

The number of cartons of cigarettes sold was 9,400,000 for 1992, 10,700,000 for 1993 and 13,829,000 for 1994. The percentage change was 40% from 1992 to 1994 and 23% from 1993 to 1994. When applied to calculate overtime during the PCX period, the maximum amount of uncompensated overtime is $65,000. The change in sales volume was similarly significant. In 1992, the amount of the company's sales (in rounded figures) was $192,000,000.00; in 1993 it was $219,000,000.00 and in 1994, it was $270,000,000.00. Expressed in terms of percentages, there was a 47% change between 1992 and 1994 and a 29% change between 1993 and 1994. When applied to calculate overtime during the PCX period, the maximum amount of uncompensated overtime is $19,000.

The district court's determination, without any testimony to support it, that a change of this magnitude in the sales and volume of business would not require any additional time to accomplish the consequent work is without merit and does not constitute a "just and reasonable inference" as required by this Court for such a determination. The only equitable method to determine what amounts, if any, are to be assessed as damages must utilize accepted economic and statistical principles in any calculation of the overtime hours worked: using annualized figures and taking into account the growth in the sales and volume over the period in issue.

Accordingly, defendants' maximum liability for the PCX period is between $19,000 and $65,000.

Accordingly, the Secretary's calculations, adopted by the district court and affirmed by the Court of Appeals, do not reasonably reflect the average amount of overtime worked by HLA's employees during the PCX period. Therefore, the district court's determination, affirmed by the Court of Appeals, is in conflict with this Court's rulings: a calculation made without any basis in statistical or economic rationality cannot be found to constitute "just and reasonable inference."

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the petition for writ of certiorari should be granted.

Dated: May 24, 2005
New York, New York

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

No. 04-0509-CV
Feb. 23, 2005

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

ELAINE L. CHAO,

Plaintiff-Appellee,

v.

HAROLD LEVINSON ASSOCIATES, INC., A Corporation, and EDWARD BERRO, Individually and as President,

Defendant-Appellants.

ROBERT E. GOLDMAN, New York, N.Y. (Andrew M. Lankler, Idelle R. Abrams, Lankler & Carragher, LLP, New York, NY, *on the brief*), for Appellant.

JOAN BRENNER, Attorney, United States Department of Labor, Office of the Solicitor, Washington, DC (Howard M. Radzely, Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, *on the brief*), for Appellee.

PRESENT: SOTOMAYOR, KATZMANN, *Circuit Judges*, and CEDARBAUM,* *District Judge*.

SUMMARY ORDER

Defendant-appellants Harold Levinson Associates and Edward Bello appeal from a December 31, 2003 judgment entered in the United States District Court for the Eastern District of New York (Charles R. Wolle, J., sitting by designation). We assume the parties' familiarity with the facts and procedural history of this case. On this appeal, defendant-appellants Harold Levinson Associates and Edward Bello raise two issues previously decided by the district court and this Court. *See Harold Levinson Assocs., Inc. v. Chao*, 37 Fed. Appx. 19 (2d Cir. 2002); *Herman v. Harold Levinson Assocs., Inc.*, No. CV-95-1721, 2001 WL 34088698 (E.D.N.Y. Apr. 20, 2001). They argue (1) that they are

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* Hon. Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

entitled to a credit of $529,000 against their liability under Section 7(h) of the Fair Labor Standards Act, 29 U.S.C. § 207(h), and (2) that the formula for computation of damages specified by this Court on remand does not yield a just and reasonable approximation of overtime hours worked because it fails to take into account the growth of defendants' business over time. We note that the district court was correct that these issues were decided against defendants in this Court's prior order and were outside the scope of our order on remand. We do not reach plaintiff's argument that the doctrine of the law of the case bars reconsideration of these issues, however. The district court in its discretion received new evidence and argument, and we agree with its determination that defendants' arguments are wholly without merit. *See Furlong v. Shalala*, 238 F.3d 227, 235 n. 4 (2d Cir. 2001) (noting that doctrine of law of the case is purely discretionary); *DiLaura v. Power Auth.*, 982 F.2d 73, 76 (2d Cir. 1992) (noting that the doctrine is not a limit on a court's power to reconsider its decisions).

Defendants fail to establish that the $529,000 in question was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2), and thus their claim that this Court's prior denial of a § 207(h) credit was error is baseless.[1] *See Harold Levinson Assocs., Inc.*, 37 Fed.Appx. at 20 (reject-

[1] *Compare* 29 U.S.C. § 207(h)(2) (providing, via cross-reference to 29 U.S.C. § 207(e)(5), that credit is available for, *inter alia*, "compensation provided by a premium rate for certain hours worked by the employee" in excess of the maximum applicable workweek) *with* Defs.' Br. at 18 (arguing that pretrial stipulations bind this Court to find that the funds in question were premium "pay for which no overtime was worked"). Defendants fail to point to any evidence suggesting that § 207(e)(5), (6) or (7), as incorporated in § 207(h)(2), are applicable.

ing claim to offset because "this case does not involve payments that satisfy the requirements of [§ 207(h)]"). As to the calculation of damages, the district court correctly found that the evidence adduced by defendants at the second trial did not call into question the reasonableness of the formula this Court previously settled on to determine overtime hours worked between May of 1992 and October of 1993. *See id.* at 22. Defendants' evidence consisted of a damages calculation which assumed, quite implausibly, that overtime person-hours grew in direct proportion to gross sales measured in dollars or sales measured by the number of cigarette cartons shipped (defendants do not bother to specify which). There was no evidence to support the crucial assumption that HLA took no steps to increase productivity as its business grew; indeed, as the district court correctly found, there was no direct evidence at all concerning the impact of this growth on HLA's personnel to rebut the credible testimony of employees at the first trial that their hours remained relatively constant during the relevant period. *See id.* The calculations did not include even the rudimentary step of controlling for change in the number of employees over time, which would certainly affect the number of overtime hours worked. This Court's instructions in its prior order yield a reasonable estimate of damages, and the district court did not err in rejecting defendants' unreasonable and belatedly proffered alternative. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); *Reich v. Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir.1997). Defendants assign no other error to the calculation the district court performed pursuant to our instructions.

For these reasons, we affirm the judgment of the district court in all respects.

121 Fed.Appx. 918, 2005 WL 428787 (2nd Cir.(N.Y.))

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NO. 95 cv 1721 (CRW)
December 30, 2003

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

Plaintiff,

—against—

HAROLD LEVINSON ASSOCIATES, INC., A Corporation, and
EDWARD BERRO, Individually and as President,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT FOR PLAINTIFF ON REMAND

On August 4, 2003, the undersigned visiting Senior United States District Judge (presiding in this case upon intercircuit assignment) concluded a bench trial on remand, then set a briefing schedule requiring final briefs and proposed decisions to be filed by September 2, 2003. With the case now ready for ruling, the court files this remand decision containing findings of fact, conclusions of law, and directions for entry of final judgment. The clerk of court shall enter judgment for plaintiff and against defendants in the amount of $831,147.18 for actual damages and liquidated damages allocated to the underpaid employees as set forth in plaintiff's exhibits 1 and 2 received in evidence at trial. Plaintiff is also entitled to the costs of this action.

Background. In September of 2000, the court held a bench trial and thereafter filed Findings of Fact, Conclusions of Law, and a Judgment for plaintiff (the "earlier judgment"), awarding plaintiff total damages of $991,669.16, for distribution to employees and former employees of the defendants.

Following appeal, the United States Court of Appeals for the Second Circuit in an unpublished "summary order" dated May 22, 2002, affirmed in part and vacated and remanded in part. Following remand, the undersigned Senior United States District Judge first held a hearing on plaintiff's motion for recusal, then denied the motion. A one-day bench trial followed several months later.

With the record now complete, and final briefs submitted, the court enters this remand decision that rules on reserved evidentiary questions and decides the issue remanded by the Court of Appeals. The court also addresses and decides questions the defendants believe the Court of Appeals left open.

The parties disagree about what issues the Court of Appeals remanded. Plaintiff contends this court's only task is to recalculate the damages awarded to all but three employees, and to recalculate for only one of the two relevant time periods, the so-called PCX period from May of 1992 to October of 1993 which preceded defendants' installation of a time clock. Defendants, in contrast, read the Court of Appeals decision much differently, arguing that the court should consider their proffered new expert opinion testimony, then conclude that defendants may credit excess overtime payments made during the so-called ADP period against underpayments of overtime pay during the earlier PCX period.

The plaintiff proffers the only sound reading of the court of appeals decision. At page three of the Summary Order, that court wrote:

> "We are unable, however, to accept the importation of the average weekly hours worked for the ADP period as the assumed number of hours worked for each given week during the PCX period. The time-clock records demonstrate that hours tended to fluctuate from one week to the next. Given this reality and given that many of the derived PCX hours are based on departmental rather than individual averages, we find that actual hours worked by each individual employee for each specific PCX week cannot be derived as a matter of reasonable inference. Because damages are awarded for weeks during which the derived hours exceeded the payroll record hours, but not offset by weeks during which the payroll records exceed the derived hours, assuming that in each week of the PCX period each employee worked precisely the average number of hours worked unfairly penalizes the defendants. *We therefore remand for computation of damages (for all employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish, with respect to whom we affirm the damage amounts for both the ADP period and the PCX period) based on comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the imported ADP weekly average by total PCX period weeks worked) against total hours compensated for the PCX period.* We leave to the District Court's discretion the issue of what pay rate should be used for computing PCX period damages where an

> employee's pay rate changed during the PCX period." [Emphasis supplied.]

The court of appeals affirmed in explicit language all other aspects of the court's findings, conclusions, and the earlier judgment that defendants had appealed. And the Summary Order concluded with this final paragraph a; page 7,

> Thus, the sole issue for resolution on remand is calculation of damages for the PCX period for employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish. In all other respects, we affirm the judgment of the District Court. The judgment of the District Court is AFFIRMED in part, and VACATED AND REMANDED in part.

Remanded Damage Recalculation. During trial on remand, the court received in evidence the entire record of the first bench trial, supplemented by exhibits proffered by the plaintiff and testimony and exhibits proffered by defendants. Plaintiff's exhibits included remand exhibits 1 through 6 that accurately set forth the mathematical calculations called for by the above-quoted portions of the court of appeals decision. Defendants have not presented any credible challenge to those calculations. The plaintiff's exhibits and underlying payroll data from defendants' records support the unpaid overtime pay damages and liquidated damages for the PCX period calculated as directed by the court of appeals: comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the ADP weekly average by total PCX period weeks worked) against total hours compensated for the PCX period.

No recalculation is required for the ADP period when defendants provided a time clock, nor for the employees Hladek, Capizzi, and Krulish for either the PCX period or ADP period. The court of appeals affirmed calculation of damages sustained by those three employees in the second-to-last paragraph of its decision.

The Previous Bench Decision Revisited. Before concluding this remand decision and judgment, the court reviewed the entire record, its earlier judgment, and its detailed findings and conclusions. The court now holds there is no evidentiary basis for the several contentions urged by defendants following remand.

Cases cited by defendant suggest a district court on remand may in unusual circumstances reopen issues not explicitly decided by a court of appeals. *See U.S. v. Cerami*, 563 F.2d 26, 33 (2d Cir. 1977) (exceptional circumstances permit defendant to raise new issues before trial court in second Rule 60(b)(6) proceeding); *c.f. U.S. v. Uccio*, 940 F.2d 7533, 758 (2d Cir. 1991) (dictum) (court of appeals addresses reopened issues but adheres to its previous decision). *Contra U.S. v. Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974) (quoting J. Moore, Federal Practice, ¶0.-404[10], at 571 (2d ed. 1974)):

> Where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court.

Munro v. Post, 102 F.2d 686, 688 (2d Cir. 1939) (district court has duty to follow ruling made by court of appeals in earlier stage of case).

Recognizing that the court of appeals, in a second view of this case, may be persuaded that this is an exceptional case requiring the district court to reopen all issues, this court during the remand trial permitted defendants to present all their evidence and arguments, making a plenary trial record. Rulings were reserved on plaintiff's objections to admissibility of defendants' expert witness testimony and exhibits.

Rulings on plaintiff's objections. For the purpose of the expanded review this court has undertaken, the court now overrules plaintiff's objections to the foundation for defendants' new evidence. The court receives that challenged evidence in order that the court may determine whether all evidence supports its previous judgment and its findings of fact and conclusions of law entered after the first trial. So the defendants' new evidence is received and considered. The court finds, however, that the expert testimony is entitled to little weight.

The expert witnesses had no more data to review than the plaintiff used in its recalculation based on the new formula prescribed by the court of appeals. The expert witnesses did not use the above-quoted formula to calculate PCX period backpay damages. Their attempt to credit alleged PCX overpayments against ADP unpaid overtime violates the law precluding such adjustments in the absence of a valid prepayment plan that would comply with 29 U.S.C. section 207(f), such as a so-called Belo plan. The experts' attempt to use growth in sales and product carton volume to reduce PCX period weekly hours was entirely unpersuasive. Defendants failed to establish a correlation between hours warehouse and driver employees worked, compared to the sales and product volume they produced. The court reasonably infers that employees performing assembly, loading, and

delivery tasks may well be able to handle much greater volume without an increase in their hours at work or the number of employees performing the tasks. In addition, the experts incorrectly understood the issues of law decided by the court of appeals; they assumed payments of alleged excess overtime and holiday pay in the PDX time period could be offset against ADP period underpayments.

It is noteworthy that the witness Andrew De Francesco, defendants' present CFO, and a CPA, had no personal knowledge of defendants' operations in the PCX period before he held that position with defendants, so his opinions about business operations during PCX period are suspect. The court gives little weight to the testing of defendants' witness CPA, Alan A. Schachter, because he relied on the De Francesco testimony and had little understanding of the law governing required prepayment plans. And the other expert witnesses Cort and Klebbersmith relied on flawed analyses of data concerning comparative sales volume, carton count, and number of employees performing work in the PCX and ACP periods to support defendants' claim of overpayments credits from the later to the earlier PCX period. Defendants' new evidence presented during the remand trial was not persuasive.

Findings of fact. Because defendant failed to keep accurate records of hours worked and willfully failed to compensate for overtime hours in both the PCX period and ACP period, the court finds entirely inadequate their present efforts to reconstruct hours employees worked in the PCX period, and their claims of basic unfairness of the previous judgment finding that the plaintiff had proved defendants liable for underpayments and liquidated damages.

With its present review of the plenary remand record now complete, the court reaches the same findings of fact and conclusions of law that were contained in its previous judgment, except for the PDX period damages that are here recalculated based on the plaintiff's evidence.

Conclusions of law. This court's conclusions of law are those set forth in the previous judgment, as affirmed by the court of appeals in all respects except for the method of calculating PCX damages for all but three employees.

Judgment on remand. The clerk of court shall enter judgment for plaintiff, requiring defendants Harold Levinson Associates, Inc. and Edward Berro to pay to plaintiff the sum of $423,823.59 in unpaid overtime wage compensation and $407,323.59 in liquidated damages, for a total of $831,147.18, as set forth in the plaintiff's exhibits reflecting the plaintiff's recalculation of PCX damages, added to the damages affirmed by the court of appeals.

The defendants are ordered to pay this total amount to the plaintiff on or before January 28, 2004, by delivering to plaintiff a certified check for $831,147.18 payable to the U.S. Department of Labor, Wage and Hour Division, c/o Bank of America, P.O. Box 845229, Dallas, Texas 75283-5229. Simultaneously with the delivery of the original check, defendants shall mail copies of the check and transmittal letter to plaintiff's counsel of record.

Neither defendants nor anyone on their behalf shall directly or indirectly solicit or accept the return or refusal of any sums paid under this judgment. Plaintiff shall distribute the defendants' payments to the employees involved, or to their estates if that is necessary; any sums not distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or

because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court, who shall deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. § 2041-2042.

Plaintiff is awarded costs of this action from May 2, 1995. This judgment shall be joint and several against the two defendants.

SO ORDERED.

Dated this 30th day of December, 2003.

/s/ CHARLES R. WOLLE

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT
Sitting by designation in the
Eastern District of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Docket No. 01-6105
May 22, 2002

United States Secretary of Labor brought enforcement action against employer alleging violation of Fair Labor Standards Act (FLSA) overtime provisions. Following bench trial, the United States District Court for the Eastern District of New York, Wolle, J., entered judgment against employer and awarded back-pay damages of just under $1 million. Employer appealed. The Court of Appeals held that: (1) testimony by former employees sustained judgment, but (2) District Court made improper assumption regarding average weekly hours worked after employer's acquisition of time clock.

Affirmed in part and vacated and remanded in part.

HAROLD LEVINSON ASSOCIATES, INC., a Corporation, and EDWARD BERRO, Individually and as President,

Defendants-Appellants,

v.

ELAINE L. CHAO, Secretary of Labor, United States Dep't of Labor,

Plaintiff-Appellee.

Appeal from the United States District Court for the Eastern District of New York (Wolle, J.).[1]

Robert E. Goldman, Esq., Goldman & Weintraub, New York, NY, for Defendants-Appellants.

Joan Brenner, Esq. (Eugene Scalia, Steven J. Mandel, Paul L. Frieden, on brief), U.S. Dept. of Labor, Office of the Solicitor, Washington, DC, for Plaintiff-Appellee.

PRESENT: OAKES, KATZMANN, *Circuit Judges*, and J. GARVAN MURTHA,[2] *District Judge*.

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[1] The Honorable Charles R. Wolle of the United States District Court for the Southern District of Iowa, sitting by designation.

[2] The Honorable J. Garvan Murtha of the United States District Court for the District of Vermont, sitting by designation.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED in part, and VACATED AND REMANDED in part.

The defendants appeal the decision of the District Court following a bench trial finding the defendants liable for a failure properly to pay overtime compensation as required by 29 U.S.C. § 207(a), and awarding total damages of $991,669.16 to plaintiff for distribution to employees and to former employees of the defendants. For the reasons that follow, we affirm the District Court's finding of liability, but remand for partial recalculation of damages.

We review a district court's bench trial findings of fact for clear error and its conclusions of law *de novo*. *LeBlanc v. Cleveland,* 198 F.3d 353, 356 (2d Cir. 1999). Factual findings "will not be set aside unless they are without adequate support in the record, are against the clear weight of the evidence, or are the product of an erroneous view of the law." *Ezekwo v. New York City Health & Hosps. Corp.,* 940 F.2d 775, 780 (2d Cir. 1991).

The District Court's finding that the defendants had failed properly to record overtime hours and pay proper compensation for such hours is not clearly erroneous. Several former employees, all of whom the District Court found "credible," testified that they in many weeks worked more hours than they were paid for, and that the defendants' time records did not properly reflect hours worked. The defense offered no witnesses to rebut the testimony of the employees who testified for the plaintiff. The District Court's findings about various irregularities within the defendants' payroll system—that employees received steady pay regardless of hours worked even though no prepayment plan was in effect, that no pay

stubs were provided during part of the period in question, and that even after pay stubs were distributed, such pay stubs did not indicate hours worked—were also based on ample evidence and are not clearly erroneous.

A plaintiff need not compute FLSA damages with precision. The burden is on an employer properly to record hours, and an employee need only as a *prima facie* matter present an estimate of damages that is satisfactory as "a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). It then falls upon the employer to rebut the employee's prima facie case by providing "evidence of the 'precise amount of work performed' or evidence to 'negative the reasonableness of the inference to be drawn from the employee's evidence,' [and if the employer fails to do so] the court may then 'award damages to the employee[s], even though the result be only approximate.'" *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 67 (2d Cir. 1997) (quoting *Mt. Clemens*, 328 U.S. at 687-88). In this case, the District Court reasonably chose to discredit the attempts by the employer to utilize its own records to prove hours worked. Thus, the plaintiff needs merely to offer an estimate of damages that is satisfactory as a matter of reasonable inference.

This burden is not high, and a "representative sample" of employees can provide a foundation for assumptions about the overall employee pool, as long as a representative from each relevant category of employees testifies. *See Southern New England Telecommunications Corp.*, 121 F.3d at 66-67 (internal citations omitted) ("it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA. The Secretary's burden in such cases, while not overly onerous, is to establish a prima facie case.").

The parties stipulated that calculation of hours for the period during which a time-clock was in place (the "ADP period") would be based on such time-clock. The plaintiff used the wage rates found in the defendants' payroll records in order to calculate the damages. We find this calculation method clearly reasonable, and also find reasonable the decisions of the plaintiff with respect to estimating weekly hours for the three salaried employees and the employees who were paid bi-weekly. We therefore affirm the District Court's award of $91,758.50 for the ADP period.

The PCX period calculations present more difficult issues. As a general matter, we find reasonable the plaintiff's attempt to use the data derived from the time-clock as a basis for reconstructing the hours worked during the period (the "PCX period") preceding the installation of the time-clock. Representatives of each relevant employee category testified that hours worked had remained steady throughout the PCX and ADP periods, and the District Court specifically found that employees generally worked similar hours during these two periods. The defendants object to the importation of ADP records by asserting that the company grew by 25% from the PCX period to the ADP period, and that the ADP interval contained two holiday seasons (rather than the one found during the PCX period), which were especially busy. For these reasons, the defendants argue that importing the ADP figures into the PCX period overstates the Paychex hours. This argument is not without some force. However, it was the defendants' responsibility accurately to record hours. In the absence of credible recordkeeping by the defendants, and given the testimony that hours remained stable across the two periods, we find that reference to the ADP figures provides a reasonable method of calculating PCX period damages.

We are unable, however, to accept the importation of the average weekly hours worked for the ADP period as the

assumed number of hours worked for each given week during the PCX period. The time-clock records demonstrate that hours tended to fluctuate from one week to the next. Given this reality and given that many of the derived PCX hours are based on departmental rather than individual averages, we find that actual hours worked by each individual employee for each specific PCX week cannot be derived as a matter of reasonable inference. Because damages are awarded for weeks during which the derived hours exceeded the payroll record hours, but not offset by weeks during which the payroll records exceed the derived hours, assuming that in each week of the PCX period each employee worked precisely the *average* number of hours worked unfairly penalizes the defendants. We therefore remand for computation of damages (for all employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish, with respect to whom we affirm the damage amounts for both the ADP period and the PCX period) based on comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the imported ADP weekly average by total PCX period weeks worked) against total hours compensated for the PCX period. We leave to the District Court's discretion the issue of what pay rate should be used for computing PCX period damages where an employee's pay rate changed during the PCX period.

We reject the defendants' argument that their purported "overpayments" of overtime in certain weeks should offset their liability for other weeks. The District Court found (correctly, in our view) that the defendants did not have a valid prepayment plan complying with 29 U.S.C. § 207(f) or with the guidance set forth in Wage and Hour Division Interpretive Bulletin No. 4, ¶¶ 53-67. While there is a difference of authority with respect to whether premium pay which is creditable pursuant to 29 U.S.C. § 207(h) may be credited across pay periods, *compare Howard v. City of Springfield,* 274 F.3d

1141, 1149 (7th Cir. 2001) ("Because the statute contemplates that overtime will be paid and calculated on a pay period basis, it is consistent with that language to calculate and apply credits in the same manner") with *Abbey v. City of Jackson,* 883 F.Supp. 181, 186-87 (E.D. Mich. 1995) (not allowing a credit across pay periods would result in a "windfall and the purposes and goals of the statute would not be served"), this case does not involve payments that satisfy the requirements of that provision. The purported "overpayments" are largely based on nothing more than assumptions that were stipulated for trial, and provide no basis for a credit.[3]

We also agree with the District Court that the defendants' violations were "willful" within the meaning of 29 U.S.C. § 255(a), and that the defendants do not satisfy the good faith reasonable belief exception to liquidated damages provided by 29 U.S.C. § 260. A FLSA violation is willful when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Herman v. RSR Security Services Ltd.,* 172 F.3d 132, 141 (2d Cir. 1999) (quoting *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988)). "The employer bears the burden of proving good faith and reasonableness, but the burden is a difficult one, with double damages being the norm and single damages the exception. To establish good faith, the employer must take

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[3] Our decision in this regard is not inconsistent with our decision to remand. Our decision to remand effectively gives the defendants the benefit of a credit for the PCX period, but does so not because as a matter of law the defendants are entitled to credit one week's overpayment against another week's liability, but because of the lack of foundation for the plaintiff's actual computations of weekly hours for the PCX period. For the ADP period (where the estimated hours are based directly on the time-clock), we decline to award any credits or to order a comparison of aggregate figures for the entire period.

active steps to ascertain the dictates of the FLSA and then act to comply with them." *RSR Security Services,* 172 F.3d at 141-42. The defendants' attempt to subvert an earlier settlement with the plaintiff, and the defendants' utter failure to implement proper recordkeeping even after the investigation giving rise to such settlement, support the finding that the defendants' violations were willful and not rooted in a good faith reasonable belief that its practices complied with FLSA.

Finally, we affirm the District Court's holding that employees Steven Hladek, Sylvia Capizzi, and Edward Krulish were not exempt from the overtime requirements of the FLSA. All three employees performed some managerial functions, but lacked the discretionary role in the organization required to satisfy the "bona fide executive, administrative, or professional capacity" exception provided in 29 U.S.C. § 213(a)(1). It appears that the District Court declined to award liquidated damages to Edward Krulish, presumably because of the closeness of the exemption issue. We affirm this decision.

Thus, the sole issue for resolution on remand is calculation of damages for the PCX period for employees other than Steven Hladek, Sylvia Capizzi, and Edward Krulish. In all other respects, we affirm the judgment of the District Court. The judgment of the District Court is AFFIRMED in part, and VACATED and REMANDED in part.

37 Fed.Appx. 19, 2002 WL 1032708 (2nd Cir.(N.Y.))

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. Civ. A. CV-95-1721.
April 20, 2001

ALEXIS M. HERMAN, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

HAROLD LEVINSON ASSOCIATES, INC., A Corporation, and
EDWARD BERRO, Individually and as President,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT FOR PLAINTIFF

WOLLE, J.

The undersigned United States District Judge, sitting by intercircuit assignment, was assigned this case for final pretrial proceedings and a bench trial. The trial was held on several days in August and September of 2000, with submission following closing arguments on September 27, 2000, and a schedule of final written proposed decisions and briefs, the last brief filed on November 9.[1]

[1] I regret that five months have elapsed between filing of the last briefs and filing of this decision. I have had to read, compare, and analyze a large number of exhibits and testimony of many witnesses, including expert witnesses. I have had difficulty comparing some witnesses testimony with the records of the defendant company. The company records did not accurately capture the time employees actually worked during most pay periods at issue in this lawsuit.

Plaintiff has proved all of its claims; defendants have not proved any defense to the claims. The clerk of court shall enter judgment in favor of plaintiff and against defendants for actual damages, liquidated damages, and costs of this action, in accordance with the following findings and conclusions.

FINDINGS OF FACT

For a better understanding of this court's findings on disputed questions of fact, the court precedes its fact-findings with the parties' stipulated facts contained within the pretrial order approved by U.S. Magistrate Judge Viktor V. Pohorelsky on June 28, 1999.

1. Defendant Harold Levinson Associates, Inc. is, and at all times hereinafter mentioned, was a corporation duly organized under the laws of the State of New York having its principal office and place of business at 100 Commercial Street, Plainview, New York, during the first portion of the investigation period. Subsequently the defendant moved to One Enterprise Place, Hicksville, New York 11801, where it is still doing business. Both places of business are within the jurisdiction of this court and defendant continues to be engaged in the business of wholesale distribution of candy, cigarettes, tobacco, and related activities.

2. Defendant corporation, at all times material to this action, regulated the employment of all persons employed by said corporation, acted directly and indirectly in the corporation's interest in relation to said employees, and was thus an employer of said employees within the meaning of section 3(d) of the Act.

3. Defendant Edward Berro, who resides at 9 Roseann Drive, Woodbury, New York 11797, and who has maintained a place of business at One Enterprise Street, Hicksville, New York 11801 is, and at all times hereinafter mentioned was, President of the aforesaid corporation, in active control and management of said defendant corporation, and was thus an employer of said employees within the meaning of section 3(d) of the Act.

4. The business activities of the defendants, as described herein, are related and performed through unified operation or common control for a common business purpose and constitute an enterprise within the meaning of section 3(r) of the Act.

5. At all times hereinafter mentioned, defendants have employed and are employing employees in and about their place of business in the activities of said enterprise engaged in commerce, or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Said enterprise, at all times hereinafter mentioned, has had an annual gross volume of sales made or business done in an amount not less than $500,000.00. Therefore, the said employees are employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of section (3)(s)(1)(A) of the Act.

6. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the names of defendants' employees, with some exceptions.

7. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the pay period end dates of the employees during their employment, except for certain listed exceptions as reflected in Defendants' Responses to Plaintiff's Request to Admit, attached.

8. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the gross wages paid, except for certain listed exceptions as reflected in Defendants' Responses to Plaintiff's Request to Admit, attached.

9. Defendants admit that plaintiff's transcriptions of the defendants' payroll records, as reflected in the "Levinson Back Wage Computations—Detail Report" prepared by William Devins and produced to defendants on or about December 9, 1997, accurately reflect the "punch detail report hours" for the time periods stated as reflected in Defendants' Responses to Plaintiff's Request to Admit, attached.

10. The plaintiff's transcriptions of the defendants' payroll records, as reflected in the reports produced to defendants on February 12, 1999, accurately reflect the following data:

(a) the names and social security numbers of defendants' employees;

(b) the pay period end dates during their employment;

(c) the gross wages actually paid;

(d) the "punch detail report hours", for the time periods stated;

(e) the hourly rates paid to employees.

11. The plaintiff's computations of back wages due accurately reflect the identities of defendants' employees, their periods of employment, their wages paid, and during the ADP period their weekly hours actually worked.

12. The wages computed by plaintiff as due each week in the ADP PERIOD REPORT for weeks in which overtime hours were worked were obtained by multiplying each employee's regular rate times 40, plus time and one-half that regular rate for each hour worked over 40 each week as reflected on the "punch detail report hours" for each employee, each week.

13. The collective bargaining agreement in force at defendants' company from May, 1992 through December, 1994 required all hourly employees to be paid time and one-half for all hours worked in excess of 40 in a workweek.

[In addition to these thirteen paragraphs of stipulated facts, the court finds the following facts established by a preponderance of the evidence in this record.]

14. This case concerns defendants' payment of employees during the payroll periods from (1) May of 1992 to October of 1993 (hereafter "Paychex") when the Paychex payroll company prepared payment records, and (2) October 1993 to December 1994 when the ADP payroll company prepared pay records. In October 1993, defendants installed a computerized time clock that produced records of hours worked thereafter.

15. Beginning in 1990, an FLSA investigator determined that defendants had been violating the record-keeping and overtime requirements of federal law by failing to record and maintain actual hours employees worked and by failing to pay premium pay for hours worked in excess of 40 each week. Defendants agreed with the FLSA investigator to make full restitution of $79,436 to 43 employees adversely affected by the violations. The next year defendants provided the investigator signed statements from the employees whom defendants purported to pay the amounts defendants had agreed to pay. But defendant Berro and the defendant company's representatives, working at Berro's direction, used threats of adverse employment action to persuade most employees to sign the checks and receipts, then return to the defendant company the money paid to them in restitution. Defendants' conduct in forcing employees to return the moneys owed them for violations of federal law persuasively proves that defendants have not only ignored FLSA requirements then and more recently but have intentionally flaunted FLSA principles of law. Subsequent actions by defendants in the pay periods here in question confirm that Berro and the defendant company have continually, willfully evaded and violated known requirements of the FLSA.

16. The many employees that plaintiff presented to testify at trial provided credible testimony, without exception. The court finds the employees' testimony consistent with the plaintiff's contention that in the time periods May 1992 through October 1993 and October 1993 to December 1994, defendants made no sincere effort to have records accurately reflect the lengthy hours that employees really worked. Even when the time clock was installed in October 1993, the time clock included a generic program to

deduct a lunch break that many employees did not take. From May 1992 to October 1993, the payrolls were prepared based on general schedules of hours for each employee, and the employees almost always worked more time than shown on the schedules. And the schedules did not accurately reflect the employees' time working at the facility or on the road.

17. Throughout the period October 1993 to December 1994, the company did not accurately pay for hours actually worked. Hours on the ADP payroll were created not from time actually worked but from schedules prepared to have the gross pay defendants determined an employee should earn match the salaries sent to ADP.

18. Throughout both time periods, employees routinely worked Saturdays, were paid cash for their work, and worked longer hours than shown on defendants' records.

19. Throughout the time periods in question, employees were hired by defendant Berro or his designees, with a net take-home salary negotiated. They did not advise employees that they would be paid overtime compensation nor a particular hourly rate. Warehouse employees were routinely paid $80 to $120 in cash for weekend work regardless of the number of hours actually worked. Warehouse employees credibly testified that they worked the number of hours each week reflected on the plaintiff's summary exhibits. Most warehouse workers worked about the same number of hours each week, but with variations from one-fourth hour to several hours. Many rode to and from work together and worked from the time they arrived until the time they left. Employees who were drivers credibly testified they delivered to customers during many more hours than the records reflected, as shown in the plaintiff's summary

exhibits. Drivers testified credibly that other drivers who did not testify worked essentially the same number of hours as the witnesses, including many overtime hours for which no overtime was paid. Drivers continued to work through lunch breaks even though the company excluded break time from their payroll time.

20. Clerical employees credibly testified that all clerical employees worked many hours for which they were not compensated, and overtime for which they were not compensated at one and one-half times their rate, as reflected accurately on the plaintiff's summary exhibits.

21. The warehouse employees, driver employees, and clerical employees worked about the same number of hours each week from October 1993 to December 1994 as in the previous payroll periods before the company installed a computerized time clock.

22. Notwithstanding testimony of defendants' chief financial officer Andrew DeFrancesco and the expert witness Alan A. Schachter, the court finds that the company had no agreed plan to pay any employee in accordance with a lawful prepayment plan; no such plan was in writing or pre-approved.

23. Although the collective bargaining agreement between the defendant company and the union that represented its employees provided that employees would be paid at a regular hourly rate plus one and one-half times the rate for overtime hours in excess of 40 in a work week, the company ignored those provisions in the collective bargaining agreement and the union did not protest or seek to correct the record-keeping and overtime pay violations.

24. The employees Hladek, Krulish, and Cappizzi performed some supervisory and administrative duties, but their principal tasks were ordinary non-exempt work, and they spent most of their work time at non-exempt work. Those employees were not exempt from the requirements of overtime pay under the FLSA.

25. Only after January of 1995 did defendants begin paying employees for actual hours worked, based on the time clock installed during the ADP period. But even then, defendants allowed employees to work longer hours than the time clock registered.

26. The plaintiff's exhibits reflect as accurately as possible the actual time defendants' employees worked and the actual pay they received. The plaintiff properly ignored those Paychex payroll records and time clock records that did not square with the time employees said they actually worked. The plaintiff's summary exhibits provide reasonably accurate approximations of the hours employees worked in each payroll period and overtime pay unpaid, based on credible testimony of the employee witnesses. Plaintiff's witnesses properly used averaging to determine the amount defendants should have paid the employees, because the defendants failed in their duty to keep accurate records of hours worked and overtime hours for which premium pay was required.

27. Although the defendants' employees rarely complained that they were not paid in accordance with the FLSA, employees did not know or understand their rights under the FLSA. Until 1995 defendants did not provide employees sufficient information about hours worked and pay calculations from which they could determine the actual hours for which they were paid, compared to the

actual hours they worked. From May 8, 1992 until October 15, 1993, employees received their pay in cash in envelopes with no pay stubs or other payroll information. From October 15, 1993 through December 31, 1994, the employees did not receive accurate information about their arrival and departure times nor the working time deducted from their pay for lunch breaks or other reasons.

28. Defendants did not prove their defense that they had a so-called "Belo" prepayment plan with individual employees and groups of employees to prepay overtime compensation and stabilize employees' weekly pay. Defendants had no such written agreements or oral agreements with employees. Defendants did not prove the fluctuation in hours each employee worked was so great that a Belo plan was necessary. Defendants did not calculate employees' wages in accordance with such prepayment plans.

CONCLUSIONS OF LAW

1. Jurisdiction of this action is conferred upon the court by Sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, *et seq.*) and 28 U.S.C. § § 1331 and 1345.

2. Defendants Harold Levinson Associates, Inc. and Edward Berro are employers within the meaning of section 3(d) of the Fair Labor Standards Act. Defendants constitute a covered enterprise within the meaning of section 3(s)(1)(A) of the Act.

3. The court overrules all objections made during trial on which ruling was reserved. Objections have been considered in determining the weight to be given evidence. Plaintiff's exhibits, including summaries based on employ-

ees' testimony and inadequate yet useful records kept by the defendant company, fairly represent and summarize the evidence about hours employees actually worked and amounts due for unpaid overtime compensation.

4. Defendants violated Section 7 of the Act by failing to pay employees for all hours worked over forty in a week at time and one-half the employee's regular hourly rate.

5. Defendants violated Section 11(c) of the Act by failing to accurately record all the hours employees actually worked either on a daily or weekly basis.

6. The court ruled in an Order dated August 7, 2000, after receiving briefs and oral arguments of counsel, that for purposes of computing proper overtime pay, each work week stands alone. Federal law does not ordinarily allow an employer to credit for past or future payroll time periods the money above minimum wags that employees are paid in a given time period. *See* 29 C.F.R. §§ 778.104 and 106. Section 778.104 provides in pertinent part:

> [p]ayment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

7. Defendants' violations of the overtime and record-keeping provisions of the FLSA were willful under the Portal-to-Portal Act, 29 U.S.C. § 255, and therefore a three-year statute of limitations applies. After the 1991 investigation, defendants did not seek an opinion from the Wage and Hour Administrator or the Secretary of Labor concerning their pay practices that are here challenged. Before October of 1993, defendants defied the results of

the Secretary's investigation and continued to keep inaccurate and incomplete records. Defendants did not record the actual hours employees worked and did not compensate employees at the rate of time and one-half their regular hourly rate for each hour worked in excess of 40 each work week.

8. Defendants violated the law and their agreement with the Secretary by forcing employees to return to defendants the unpaid overtime compensation found due in the Secretary's 1991 investigation, unpaid wages in amounts defendants had agreed to pay. Defendants threatened employees with adverse employment consequences if employees refused to make the requested pay-backs. The defendants' records of payments were therefore false. This unconscionable conduct proves persuasively that defendants' violations of record-keeping and wage-payment requirements were intentional, willful violations.

9. During the period May 1992 to October 1993 defendants falsified their records of hours worked; during the period October 1993 to December 31, 1994, defendants maintained multiple sets of payroll records, some purporting to comply with the requirements of the Act. Defendants willfully disregarded their obligations to pay employees time and one-half their regular rate for hours worked over 40 each work week as required by their contract with the union and by the FLSA.

10. During the period May 1992 to October 1993, defendants knew that employees were working more hours than they were being paid for. Defendant Berro was present on a daily basis and observed employees working. Defendants scheduled and required the employees to work the number of hours they did, often more hours than scheduled. Defen-

dant Berro's deposition testimony to the contrary was evasive and not credible. Berro directed other management personnel to pay employees his way, knowing that his way violated the law. He rejected other officers' suggestions that he hire other employees and add another shift, believing his method of paying fixed salaries covering all hours worked for all employees gave him better control of the employees and the overall operation of the business.

11. During the period October 1993 to December 31, 1994, defendant Berro and management personnel working at his direction supervised the employees and knew they were working the number of overtime hours they actually worked. Defendants paid by schedules of work rather than actual hours worked even after they had the means to record and pay by actual hours after the installation of their time clock. During the period October 1993 to December 1994 defendants failed to pay time and one-half the regular rate for all hours worked over 40 each work week even after the installation of their time clock. During this period defendants conducted business with the actual knowledge that employees were working on a weekly basis more hours than they were being paid for, including overtime hours for which no overtime rate was paid. The defendants' record-keeping and overtime violations of the Act were willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-36 (1988); *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 141-42 (2d Cir.1999); *Reich v. Waldbaum, Inc.* 833 F.Supp. 1037, 1045 (S.D.N.Y.1993), *aff'd*, 52 F.3d 35, 39-41 (2d Cir.1995); *Brock v. Superior Care*, 840 F.2d 1054, 1062-64 (2d Cir.1988).

12. The court denies the plaintiff's request for injunctive relief because the plaintiff has not shown that the defen-

dants are still violating the FLSA or that injunctive relief is needed to prevent future violations of the FLSA.

13. Plaintiff has sustained the burden to prove the number of unrecorded hours all employees worked and the back wages due to those employees who did not testify. Testimony of the credible employees who did testify was fairly representative of testimony those not testifying would have presented. *See Anderson v. Mt. Clemens Pottery Co.*, 327 U.S. 680 (1946); *Reich v. Southern New England Tele. Corp.*, 892 F.Supp. 389, 405 (D.Conn.1995), *aff'd*, 121 F.3d 58 (2d Cir.1997); *Reich v. Waldbaum, Inc.*, 833 F.Supp. 1037, 1045 (S.D.N.Y.1993), *aff'd*, 52 F.3d 35, 39-41 (2d Cir.1995); *Dole v. DeSisto*, 929 F.2d 789, 792-93 (1st Cir.1991); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1297 (3d Cir.1991); *McLaughlin v. DialAmerica Marketing*, 716 F.Supp. 812, 824-25 (D.N.J.1989), *aff'd sub nom. Donovan v. DialAmerica Marketing*, 935 F.2d 1281 (3d Cir.1991), *cert. denied*, 502 U.S. 981 (1991).

14. Plaintiff established a *prima facie* case by a preponderance of all the evidence. Employee witnesses provided adequate evidence of the hours worked by drivers, clericals, and warehouse employees. Defendants failed credibly to rebut the testimony of these employees. Defendants' flawed records, together with employees' credible testimony, established overtime compensation was not paid for all hours employees worked over 40 in each work week. The plaintiff's proffered method of computation of unpaid overtime compensation, as set forth in Exhibits 3-9, is reasonable.

15. Employees Hladek, Cappizzi, and Krulish are salaried employees due overtime at additional half-time their regular hourly rate for all hours worked in excess of 40 each

week. Defendants did not prove they were exempt from the overtime provisions of the Act. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 391-92 (1960); *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir.1983); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900-07 (3d Cir.1991); 29 C.F.R. § 541.

16. For the period May 2, 1992 until December 31, 1994, defendants must pay $487,584.58 in unpaid overtime compensation to 105 employees, as set forth in trial Exhibit 10, plus $16,500 due to Edward Krulish, for a total of $504,084.58 due those 106 employees.

17. After plaintiff credibly proved a *prima facie* case of FLSA violations, defendants did not meet their burden to rebut the plaintiff's proof of FLSA violations. Defendants did not prove their proffered, though unpleaded, defense based on prepayment and delayed payment of overtime compensation. Defendants did not prove they paid overtime compensation to employees for all hours worked in excess of 40 each week. *See Reich v. State of New York*, 3 F.3d 581 (2d Cir.1993).

18. Defendants did not plead or prove at trial the existence of a bona fide so-called "Belo" prepayment plan, nor did defendants prove any defense to the plaintiff's claims of record-keeping and overtime violations of the Act. A bona fide prepayment plan requires an explicit agreement between the employer and employee, employees regularly working hours less than 40 per week, and a weekly record of the running amount of prepaid overtime. In this case, there was no such agreement. Employees invariably worked in excess of forty hours per week, and the defendants kept no records of a running account of overtime purported to be prepaid. Defendants failed to carry their

burden to prove the existence of any valid prepayment plan.

19. Defendants failed to carry their burden to prove they had a reasonable and objective good faith basis for their violations of the overtime and record-keeping provisions of the FLSA, or that they had reasonable grounds for believing that their record-keeping and overtime practices were in compliance with the FLSA. *See Reich v. Southern New England Tele. Corp.,* 892 F.Supp. 389, 405 (D.Conn. 1995), *aff'd,* 121 F.3d 58 (2d Cir. 1997). Defendants were not just reckless, they were willful in intentionally violating record-keeping and overtime pay requirements of the FLSA.

20. Plaintiff is awarded $487,584.58 in liquidated damages, equal to the unpaid overtime compensation in the amounts listed on plaintiff's trial Exhibit 10. *See Herman v. RSR Sec. Servs. Ltd.,* 172 F.3d 132, 141-42 (2d Cir.1999); *Reich v. Southern New England Tele. Corp.,* 892 F.Supp. 389, 405 (D.Conn. 1995), *aff'd,* 121 F.3d 58 (2d Cir. 1997); *Brock v. Wilamosky,* 833 F.2d 11, 19-20 (2d Cir. 1982); *Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 907-11 (3d Cir. 1991) (reh'g denied), *cert. denied,* _____ U.S. _____, 112 S.Ct. 1473 (1992).

21. On or before May 14, 2001, the defendants are ordered to deliver to plaintiff's counsel, or other designated representative of plaintiff, a certified check or equivalent payment in the total amount of $991,669.16 for distribution to the employees who were underpaid during periods here in question.

22. Neither the defendant Berro, nor the defendant company, nor any person on their behalf shall directly or indi-

rectly solicit or accept their return by any employee of any sums defendants pay to employees as damages, in accordance with this decision and the judgment to be entered by the clerk of court on April 30, 2001.

23. By noon on April 27, 2001, the parties shall submit to the clerk of court a joint proposed judgment to be entered by the clerk, or separate proposed judgments, from which the court and clerk of court will enter final judgment on April 30, 2001.

IT IS SO ORDERED.

2001 WL 34088698 (E.D.N.Y.)

Supreme Court, U.S.
FILED
AUG 31 2005
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No. 04-1602

In the Supreme Court of the United States

HAROLD LEVINSON ASSOCIATES, INC., ET AL.,
PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' liability for unpaid overtime compensation may not be offset by a credit under Section 207(h)(2) of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(h)(2), which authorizes such credit for "extra compensation" paid to employees that meet the qualifications set forth in 29 U.S.C. 207(e)(5)-(7), because petitioners failed to establish that they paid the qualifying extra compensation.

2. Whether the court of appeals was correct to uphold the district court's finding that the Secretary correctly calculated, as a matter of just and reasonable inference, the amount and extent of work that employees performed without being properly compensated.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 10, 11, 12
Brock v. *Wilamowsky*, 833 F.2d 11 (2d Cir. 1987) 8
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987) 9
Herman v. *RSR Sec. Servs, Ltd.*, 172 F.3d 132 (2d Cir. 1999) 8
Overnight Motor Transp. Co. v. *Missel*, 316 U.S. 572 (1942) 8
Reich v. *Southern New England Telecomm. Corp.*, 121 F.3d 58 (2d Cir. 1997) 8, 11
Walling v. *A.H. Belo Corp.*, 316 U.S. 624 (1942) 7

Statutes, regulations and rule:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 2
29 U.S.C. 207 2
29 U.S.C. 207(a)(1) 2
29 U.S.C. 207(e) 2

Statutes, regulations and rule—Continued: Page

29 U.S.C. 207(e)(5)–(7) 2, 7
29 U.S.C. 207(e)(5) 2, 7
29 U.S.C. 207(e)(6) 2, 7
29 U.S.C. 207(e)(7) 2, 7
29 U.S.C. 207(f) 7
29 U.S.C. 207(h) 4, 5
29 U.S.C. 207(h)(2) 2, 6, 7
29 U.S.C. 215(a)(2) 2
29 U.S.C. 216(c) 2, 3
29 U.S.C. 217 2
29 U.S.C. 260 ..... 3, 8
29 C.F.R.:
Pt. 211:
Section 211(c) 2
Pt. 516 2
Pt. 778:
Section 778.201(c) 7
Sup. Ct. R. 10. 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is *reprinted in* 121 Fed. Appx. 918. The remand decision of the district court (Pet. App. 6a-14a) is unreported. The initial summary order of the court of appeals (Pet. App. 15a-22a) is not published in the *Federal Reporter* but is *reprinted in* 37 Fed. Appx. 19. The initial decision of the district court (Pet. App. 23a-39a) is not reported in the *Federal Supplement* but is *available at* 2001 WL 34088698.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2005. The petition for a writ of certiorari was filed on May 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires employers to pay overtime pay to covered employees at a rate not less than one and one-half times the employee's regular rate for any hours worked over 40 in a workweek. 29 U.S.C. 207(a)(1), 215(a)(2). For purposes of the FLSA, an employee's "regular rate" of pay is defined to include "all remuneration of employment paid to, or on behalf of, the employee," with certain enumerated exceptions. 29 U.S.C. 207(e). Those exceptions include, among others, certain extra compensation provided at a premium rate for hours worked over eight in a day; for work performed other than on regular workdays; or for work performed outside a workday or workweek established pursuant to an employment contract or collective bargaining agreement. 29 U.S.C. 207(e)(5), (6) and (7). An employer may credit extra compensation paid that falls under any of the exceptions listed in Section 207(e)(5)-(7) against overtime compensation payable to the employee under Section 207. 29 U.S.C. 207(h)(2).

The FLSA also requires covered employers to keep records of their employees' wages and hours. 29 C.F.R. 211(c); see 29 C.F.R. Pt. 516. The Secretary of Labor may sue to redress violations of the FLSA's minimum wage, overtime, and record-keeping provisions. See 29 U.S.C. 216(c), 217. In addition to recovering back pay for affected employees, the Secretary may recover an

equal amount in liquidated damages, unless the employer shows that he acted in good faith and had reasonable grounds for believing his actions did not violate the FLSA. 29 U.S.C. 216(c), 260.

2. Petitioners are a corporation and its president who are engaged in the wholesale distribution of cigarettes, tobacco, and candy and related activities. Pet. App. 24a. In 1990, a Labor Department investigator determined that petitioners had been violating the FLSA's record-keeping and overtime requirements. *Id.* at 28a. Petitioners agreed to make full restitution and provided the investigator with signed statements showing that employees had been paid, but later forced employees to return the money. *Ibid.* Between May 1992 and December 1994, the time period at issue in this case, petitioners made no genuine effort to maintain records that accurately reflected the lengthy hours that employees worked. *Ibid.* Between May 1992 and October 1993, when petitioners used Paychex, a payroll services company, to prepare its payment records, the payrolls were based on general schedules of hours that did not accurately reflect employees' working time. *Id.* at 27a, 29a. From October 1993 to December 1994, when petitioners used ADP, another payroll services company, to prepare their payment records, they created payroll hours for ADP that did not reflect time actually worked. *Id.* at 29a.

The Secretary of Labor brought an enforcement action against petitioners, alleging violations of the overtime and record-keeping provisions of the FLSA. Pet. App. 15a, 33a. After a bench trial, the district court found, *inter alia*, that petitioners had "continually, willfully evaded and violated known requirements of the FLSA." *Id.* at 28a. The court also found that petition-

ers had no lawful prepayment (or pay stabilization) agreement with its employees and that petitioners had ignored provisions in the collective bargaining agreement calling for an overtime rate of one and one-half times the regular rate for hours in excess of 40 hours in a workweek. *Id.* at 30a, 32a (factual findings), 37a-38a (legal conclusions).

Accepting the Secretary's calculations of actual time worked, actual pay received, and overtime pay due petitioners' employees, the court awarded $487,584.58 in back wages to 105 employees and an equal amount in liquidated damages (plus an additional $16,500 in back wages to one of the three employees for whom an exemption from overtime defense was claimed but not proved). Pet. App. 37a-39a.

3. On May 22, 2002, the court of appeals affirmed the majority of the district court's findings, but vacated and remanded the case solely for a "partial recalculation of damages." Pet. App. 17a. Finding that the damages award "unfairly penalizes the [petitioners]" by assuming that "in each week of the PCX [*i.e.*, Paychex] period each employee worked precisely the *average* number of hours worked [during the ADP period]," the court instructed recalculation to be "based on comparison of the total hours worked by each employee for the entire PCX period (computed by multiplying the imported ADP weekly average by total PCX-period weeks worked) against total hours compensated for the PCX period." *Id.* at 20a. In so doing, however, the court also rejected petitioners' argument that they were entitled to an offset for "overpayments" to their employees, recognizing that "this case does not involve payments that satisfy the requirements" of Section 207(h). *Id.* at 21a. It explained that its "decision to remand effectively gives the

[petitioners] the benefit of a credit for the PCX period, but does so not because as a matter of law [they] are entitled to credit one week's overpayment against another week's liability, but because of the lack of foundation for the [Secretary's] actual computations of weekly hours for the PCX period." *Id.* at 21a n.3.[1]

4. Following the remand order, the Secretary performed the directed recalculations, and a bench trial was held on August 4, 2003. Pet. App. 6a. The district court issued a decision on December 30, 2003, which upheld the Secretary's calculations and awarded $831,147.18 in actual and liquidated damages. *Id.* at 6a, 13a.[2] Based on the "plenary trial record" (including new evidence) developed in the event that the court of appeals might be persuaded to "reopen all issues," *id.* at 11a, the court reached the same findings of fact and conclusions of law it had adopted in its first decision "except for the method of calculating PCX damages for all but three employees." *Id.* at 13a.

5. The court of appeals affirmed. Pet. App. 1a-5a. The court initially noted that its earlier decision had rejected petitioners' arguments that (1) they were entitled, under Section 207(h), to a credit of $529,000

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[1] In effect, the court suggested that the use of the ADP departmental averages in the original calculations resulted in overstating the amount of owed overtime payments in weeks in which the recorded hours worked by an employee (who worked only during the Paychex period) were less than the departmental average. See Pet. App. 20a.

[2] The district court determined: "[The Secretary's] exhibits * * * accurately set forth the mathematical calculations called for by * * * the court of appeals decision. [The petitioners] have not presented any credible challenge to those calculations." Pet. App. 9a.

against their liability,[3] and (2) that the district court's formula for damages did "not yield a just and reasonable approximation of overtime hours worked." *Id.* at 3a. Nonetheless, the court considered the new evidence brought before the district court and concluded that petitioners' arguments were "wholly without merit." *Ibid.* Specifically, the court held that petitioners had failed to show that any alleged "overpayment" was made "for any of the purposes specified at 29 U.S.C. § 207(h)(2)." *Ibid.* Moreover, the court held that the district court acted reasonably in adopting the Secretary's recalculation of damages and in rejecting petitioners' "unreasonable and belatedly proferred alternative." *Id.* at 4a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this fact-bound case is unwarranted.

1. Petitioners' principal contention (Pet. 17-26) is that the circuits are divided over the question whether an employer's payment of extra compensation to its employees may "be credited across work weeks or work periods to offset liability for overtime wages" under 29 U.S.C. 207(h)(2). Pet. 16. No such question is presented in this case, however, because petitioners failed to establish that any alleged overpayment to their employees "was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2)." Pet. App. 3a.[4]

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[3] According to petitioners, this sum is derived from their expert's calculation that petitioners had overpaid their employees $540,000, and underpaid them $11,000, for a net overpayment of $529,000. Pet. 13.

[4] Petitioners assert (Pet. 5 & n.1) that they paid $529,000 in extra compensation during the ADP period as part of an agreement to make

Section 207(h)(2) allows a credit only for compensation paid pursuant to 29 U.S.C. 207(e)(5), (6) and (7), *i.e.*, compensation paid at a premium rate for hours that exceed an eight-hour workday, for Saturday, Sunday, or holiday work, or for work outside a workday or workweek established by an employment contract or collective bargaining agreement. See 29 C.F.R. 778.201(c) ("No other types of remuneration for employment may be credited."). As the court of appeals explained, petitioners "fail[ed] to point to any evidence suggesting that § 207(e)(5), (6) or (7), as incorporated in § 207(h)(2), are applicable." Pet. App. 3a n.1. The court of appeals accordingly did not consider whether premium pay creditable pursuant to 29 U.S.C. 207(h)(2) may be credited

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up the difference between what the employees would have earned in overtime compensation before the period at issue in this case and what they would earn under the collective bargaining agreement governing that period. Even if true, there would be no claim that any extra compensation relating to either the Paychex or ADP periods was paid for the purposes specified in Section 207(e)(5)-(7). Instead, petitioners defended on the basis of 29 U.S.C. 207(f), which addresses prepayment plans for employees with unpredictable and irregular hours of work. Under Section 207(f), an employer may, under certain conditions and pursuant to a bona fide individual contract or a collective bargaining agreement, pay the employee a set amount each week despite varying hours worked by the employee, without incurring overtime-pay liabilities in the weeks in which the actual hours worked would normally entitle the employee to overtime pay. Those plans are known as "Belo" plans, following the decision that approved their use. See *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942). The district court found that petitioners did not have a "Belo" prepayment plan. Pet. App. 37a-38a, a finding that the court of appeals affirmed, *id.* at 20a, and that petitioners no longer contest.

across pay periods. Pet. App. 20a-21a. There is, therefore, no need for this Court to consider that question.

2. Petitioners' remaining arguments are equally without merit and do not warrant further review.

a. Petitioners suggest (Pet. 22-23) that failing to credit extra compensation against overtime liability is an enhanced penalty designed to punish the employer, rather than compensate the employee. The FLSA, however, specifies with careful precision the circumstances in which an employer is entitled to a credit; here, petitioners simply did not establish that they were entitled to one. Instead, the district court found (Pet. App. 28a-29a), and the court of appeals affirmed, that petitioners "had failed properly to record overtime hours and pay proper compensation for such hours," *id.* 17a; that petitioners' "violations were 'willful' within the meaning of 29 U.S.C. § 255(a)," *id.* at 21a; and that they "do not satisfy the good faith reasonable belief exception to liquidated damages provided by 29 U.S.C. § 260," *ibid.* See *id.* at 33a-35a, 38a.[3] The resulting award was no less, but also no more, than the statute requires, and clearly

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[3] Liquidated damages are not a penalty, but compensation to the employees for the delay in receiving the wages due as a result of the employer's FLSA violation. See *Herman* v. *RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999) (citing *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-84 (1942)). Courts have discretion to deny the award of liquidated damages *only* if the employer shows that it acted in subjective "good faith" and had objectively "reasonable grounds" for believing that its conduct did not violate the FLSA. 29 U.S.C. 260; see also *RSR Sec. Servs.*, 172 F.3d at 142. The employer bears the burden of proving both good faith and reasonable grounds, and the burden is a heavy one; double damages are the norm. 172 F.3d at 142; *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997); *Brock* v. *Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987).

does not exact an extra-statutory penalty from petitioners.

b. Petitioners contend (Pet. 23) that the "work period limitation" in this case is particularly inappropriate because the damages are averaged over work periods without accounting for any potential business changes over the time period in question. The district court, in its second decision, and the court of appeals, in its second summary order, considered that fact-bound argument and both courts soundly rejected it. Pet. App. 4a (characterizing petitioners' new evidence as "unreasonable"), 11a-12a (finding petitioners' expert witness testimony regarding the growth of Levinson's business "entirely unpersuasive"). Petitioners' attempt to relitigate that case-specific issue here is unpersuasive and unworthy of this Court's review. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

c. Petitioners suggest that the court below disregarded a stipulation between the parties regarding the amount that petitioners paid their employees. Pet. 24.[6] Petitioners interpret the stipulation to mean that the Secretary agreed that they had "paid $529,000.00 in excess premium overtime wages during the ADP period." Pet. 25. The stipulated facts, however, as reflected in the district court's first order (Pet. App. 26a-27a), contain no such agreement. Rather, the parties stipulated

[6] The stipulations entered into between the parties and listed in the pretrial order (see Pet. 25) are incorporated into the findings of fact by the district court in its April 20, 2001, judgment. Pet. App. 24a-27a.

that the Secretary's transcriptions of petitioners' payroll records were accurate, with some exceptions, as to the gross wages paid, the "punch detail report hours," and the hourly rates paid to employees. *Ibid.* Moreover, the court of appeals did not improperly disregard any stipulation, but rejected petitioners' reasoning, concluding, for the reasons previously discussed, that any "purported 'overpayments' * * * provide no basis for a credit." *Id.* at 21a.

3. Petitioners argue (Pet. 26-30) that the lower courts' damages calculations have not been demonstrated to be "a matter of just and reasonable inference," in accordance with this Court's instructions in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). By its terms, that argument is not worthy of further review because "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In any event, the courts below correctly concluded that the Secretary met her prima facie burden to establish as a matter of just and reasonable inference the amount and extent of work that employees had performed without being properly compensated in accordance with the FLSA. Pet. App. 4a, 18a-19a, 36a. Petitioners failed to rebut that inference. *Id.* at 4a, 18a, 37a.

As recognized by the court of appeals in this case, under the FLSA, "[t]he burden is on an employer properly to record hours, and an employee need only as a *prima facie* matter present an estimate of damages that is satisfactory as 'a matter of just and reasonable inference.'" Pet. App. 18a (quoting *Mt. Clemens*, 328 U.S. at 686-687). Employees who have not been properly compensated are not required to recreate with precision the record of hours worked which their employer—in viola-

tion of law—failed to keep. See *Mt. Clemens*, 328 U.S. at 687. Instead, the burden shifts to the employer to provide evidence of the precise number of hours worked, or alternatively, the employer may provide evidence demonstrating that the plaintiff's estimate was unreasonable. See Pet. App. 18a (quoting *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997)). In this case, both the district court and the court of appeals accepted the Secretary's estimate of damages,[7] based on credible testimony from employees of Levinson and the time-clock records from the ADP period, Pet. App. 18a-19a, 28a-30a. The court of appeals, in its second summary order, noted that the district court, in considering the case on remand, allowed petitioners to present new evidence regarding the reasonableness of the number of overtime hours worked by Levinson's employees. *Id.* at 3a-4a. Despite the opportunity for a "second bite at the apple," petitioners failed to persuade either court below that the estimated damages in this case were unreasonable. *Id.* at 4a.

As this Court stated nearly 60 years ago in a dispute over unpaid overtime wages: "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the require-

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[7] In its first summary order, the court of appeals affirmed the district court's judgment regarding the Secretary's estimation of damages in the ADP period. Pet. App. 19a. It remanded the case for the district court to recalculate the damages, for all but three employees, in the Paychex period. *Id.* at 19a-20a, 22a. The Secretary recalculated the Paychex-period damages in accordance with the instructions given by the court of appeals; the district court accepted the Secretary's recalculations and entered judgment against Levinson for the revised damages total. *Id.* at 9a, 13a. The court of appeals affirmed. *Id.* at 5a.

ments * * * of the [FLSA]." *Mt. Clemens*, 328 U.S. at 688. In this case, the courts below, after fully considering and rejecting the same methodological arguments that petitioners are making here, properly concluded that the Secretary established as a matter of just and reasonable inference the amount and extent of work that employees had performed without being properly compensated for overtime in accordance with the FLSA. Further review of those arguments is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

United States Supreme Court

HAROLD LEVINSON ASSOCIATES, INC.,
A Corporation, and EDWARD BERRO,
Individually and as President,

Petitioners,

v.

ELAINE L. CHAO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	4
POINT I	
THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS OVER WHETHER THE ACT ALLOWS AN EMPLOYER TO OFFSET EXTRA COMPENSATION PAID ACROSS WORK PERIODS AGAINST OVERTIME LIABILITIES OWED	4
POINT II	
THE COURTS BELOW FAILED TO CALCULATE DAMAGES AS A MATTER OF JUST AND REASONABLE INFERENCE	8
CONCLUSION	10

TABLE OF AUTHORITIES

Federal Cases *Page*

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 380 (1946)..... 3, 8-9

Bay Ridge Operating Co. v. Aaron,
334 U.S. 446 (1948)..... 6

Lanza v. Sugarland Run Homeowners Assoc., Inc.,
97 F. Supp. 2d 737 (E.D. Va. 2000)..... 7

Reich v. Southern New England Telecomm. Corp.,
121 F.3d 58 (2d Cir. 1997)..... 10

Walling v. A.H. Belo Corp.,
316 U.S. 624 (1942)..... 6

Statutes

Fair Labor Standards Act of 1938,
29 U.S.C. § 201, *et seq.*..... 1

29 U.S.C. § 207(e).....2, 5, 6

29 U.S.C. § 207(f)..... 6

29 U.S.C. § 207(h) 2, 5, 7

29 U.S.C. § 216(b) 1, 7

S. Ct. R. 10..... 9

STATEMENT

A. This case raises an urgent question of public policy regarding whether an employer that, over a given period of time, absent any complaints by a single employee and prior to any enforcement action by the Department of Labor or any other enforcement agency, fully compensates its employees at premium rates higher than required by statute or the collective bargaining agreement should not be given credit for those payments in the event a subsequent claim is made for underpayment. The Fair Labor Standards Act of 1938 ("FLSA" or the "Act"), 29 U.S.C. § 201, *et seq.*, was enacted to, *inter alia*, compensate employees for the extra wear and tear of working more than 40 hours in a work week, not to provide a bureaucratic minefield for employers.

The application of the Act, including when the Department of Labor (the "Department") seeks to enforce the overtime provisions of the Act, concerns the sole question of whether the subject employees have been properly compensated. If the employees have been properly compensated by their employer for their overtime hours, whether the compensation was paid the following week, the following month or even the following year, the employer should be found to have complied with the express terms of the Act. Indeed, the Act, which is silent as to when compensation is required, does not impose any different requirement and there is no purpose served under the Act to hold otherwise. Thus, the failure to credit the employer's actual payment of excess compensation sufficient to satisfy all of the overtime payments due and owing to its employees and to instead require the employer to pay such sums a second or third time is contrary to the purpose of the Act and the remedies provided under Section 216(b), which are compensatory only and solely intended to make the employee whole, not to punish the employer.

More critically, it is antithetical to public policy to fail to credit the employer for those sums which it voluntarily paid to its employees prior to the commencement of any litigation or enforce-

ment action. It is to the employees' benefit—as well as the Department's—that employers make such voluntary payments to their employees. If, however, employers do not get credit for those payments that make their employees whole, assuming *arguendo* that they had failed to pay for overtime previously due, there will be no incentive for them to do so voluntarily.

In this case, the Department does not dispute that Petitioner Harold Levinson Associates, Inc. ("HLA" or "Petitioner") actually paid its employees $529,000 in overtime wages[1] during the ADP period[2] *over and above* the overtime wages it was obligated to pay by statute and the collective bargaining agreement. However, the Department argues, relying upon the opinions in the courts below, that HLA should not get the benefit of the actual payments it made to its employees and these monies should not be credited as an offset against overtime wages that the lower courts found were owed to HLA's employees for the earlier PCX period. This is contrary to the language of the statute and the policy it was enacted to promote.

Given that there is no credible contention that HLA did not pay said additional $529,000 for overtime hours, it belies credibility to suggest that said sum of money should simply get lost and not even be considered, when imposing a penalty that dou-

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[1] The Department relies on the erroneous statement of the court of appeals that Petitioners did not present evidence that these monies were paid "for any of the purposes specified at 29 U.S.C. § 207(h)," Pet App. 3a, but does not argue that these monies were not paid in compensation for overtime hours worked. Moreover, contrary to the statement in the opinion below, Pet. App. 3a and n.1, the evidence in the record before the Court of Appeals demonstrated that HLA made these payments for overtime work performed by its employees and thus fall squarely within the provisions of § 207(e)(5), (6) and (7) as incorporated by § 207(h).

[2] The time period at issue, May 1992 through December 1994, was divided into two subperiods based solely upon the payroll services company and recordkeeping mechanics utilized by HLA during those subperiods: the "PCX period" ran from May 1992 through September 1993 and the "ADP period" ran from October 1993 through December 1994.

bles the employees' compensation and provides a third time that each employee is fully paid for every overtime hour worked.

B. This Court has directed that the calculation of damages under the Act must be determined as a matter of just and reasonable inference. The employer may rebut the Department's calculations by demonstrating that inferences upon which the calculations are based are unreasonable. In this case, the Department and the courts below based their calculations upon the testimony of employee witnesses that they worked essentially the same amount of overtime throughout the period at issue. Petitioners demonstrated that this testimony was statistically and factually incorrect based upon the time clock records for the ADP period that were admitted to be accurate, and submitted further statistical and economic evidence that definitively demonstrated that the Department's calculations were unreasonable because they failed to account in any way for the dramatic growth in the company between the beginning of the period in issue and the end of the period in issue. The trial court found that notwithstanding that the volume of product and sales volume in dollars increased by almost 50% from one period to the next, that it was a matter of just and reasonable inference that the same number of employees could perform 50% more work in the same amount of hours. Notwithstanding the factual, logical, statistical and economic evidence submitted by Petitioners, which demonstrated that the employee witness testimony was inaccurate and unreliable, the courts below rejected Petitioners' evidence that the Department's calculations were unreasonable. This determination is in blatant disregard of this Court's direction in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 380 (1946), and requires review.

ARGUMENT

POINT I

THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS OVER WHETHER THE ACT ALLOWS AN EMPLOYER TO OFFSET EXTRA COMPENSATION PAID ACROSS WORK PERIODS AGAINST OVERTIME LIABILITIES OWED

The Department, in its opposing brief, sidesteps the question that has resulted in differing opinions by the Circuit Courts concerning whether premium payments made for overtime wages may be credited across time periods. *See* Pet. 19-20. In doing so, the Department fails to appropriately address the question of whether HLA should receive a credit for the premium payments it made to its employees during the ADP period, against any liability it may owe for overtime incurred during the PCX period. The Department does not address the language of the statute, the plain reading of which permits the credit of premium payments without limiting such credit to the work period in which they were paid, and the Department does not address the blatant absence in both the statute and the regulations of any requirement limiting an offset of premium payments to the work period in which the overtime liability was incurred; an absence made all the more conspicuous when contrasted with other sections of the statute in which such work period language is expressly included. The Department also does not address the provision in the Secretary's own Operations Handbook which allows for offset without imposing a work period limitation. Finally, the Department does not address the anomalous situation that currently exists due to the discord and inconsistencies in the rulings by the Circuit Courts considering the issue of allowing such offsets and credits.

Significantly, and the Department does not and cannot deny this fact, HLA paid an extra $529,000 in overtime pay-

ments to its employees during the ADP period over and above the overtime payments due under the statute and the collective bargaining agreement.[3] So, in its response, the Department seeks simply to ignore the fact that HLA actually paid—and its employees actually received—these extra payments at premium rates for their overtime work, and were thus fully compensated for any unpaid overtime accrued during the PCX period.[4] The Department seeks to accomplish this evasive maneuver by relying on the Court of Appeals' erroneous statement that there was no evidence in the record that the premium payments HLA made to its employees "'was paid for any of the purposes specified at 29 U.S.C. § 207(h)(2).'" Pet. Opp. 6 (quoting Pet. App. 3a). However, this statement by the Court of Appeals is clearly erroneous because it disregarded the clear evidence in the record that HLA made these premium payments specifically for the payment of overtime and that they were identified as such.

The Court of Appeals' statement was also clearly erroneous because it was predicated on a failure to properly apply the provisions of § 207(e) in reviewing these payments. Section 207(e) provides that all monies paid to an employee are included in the calculation of the employee's regular rate of pay, unless specifically exempted under one of the enumerated exceptions set forth in its subparagraphs. 29 U.S.C. § 207(e). The Department does not claim that the extra payments, totaling $529,000, which HLA actually made to its employees, must be included in its calculation of the regular rate of pay for the respective HLA employees, and did not actually include it in its calculations. However, in order to exclude those monies,

[3] During the trial on remand, the Department disputed certain small sums included in the overall figure; however, these sums are *de minimus*.

[4] Most, although not all, of the employees to whom overtime compensation was arguably due for the PCX period were also employed and received premium compensation in excess of the overtime required by the statute or collective bargaining agreement during the ADP period.

they must fall into one of the exceptions provided in § 207(e); neither the Department nor the courts below identify the basis on which these monies were excluded or claim that the payments were excluded because they fell into one of the subsections of § 207(e) other than subsections (5), (6) or (7). Thus the Department's position, as well as the decision below, is untenable because it leaves those monies hanging in limbo—not included in calculating the regular rate of pay and not excepted because they are captured in one of the subsections to 207(e)—a position that is improper under the statute.[5]

Moreover, the Department's position is in stark contrast to public policy and economic interests which preclude penalizing an employer that voluntarily pays its employees monies in excess of the amounts required under the statute or collective bargaining agreement. The FLSA was enacted "to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948). Where an employee has received the actual compensation due, as envisioned by the statute, it is inequitable to find that the employer acted in violation of the Act. This is especially true here where Petitioner voluntarily paid more than required by the collective

[5] The monies paid by an employer must be accounted for under one of the subsections of 207(e) or be included in the monies used to calculate the regular rate of pay, regardless of whether the employer *also* contends that it made its premium overtime payments pursuant to a *Belo* plan or other prepayment plan to allow a steady income stream for an employee with irregular hours. 29 U.S.C. § 207(f); *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942). Thus, contrary to the Department's suggestion, Pet. Opp. 6 n.4, the fact that Petitioners initially argued that there was a valid prepayment plan does not affect the separate question of how monies paid to an employee are classified under 207(e), or HLA's claim, which is supported by the evidence, that the premium compensation it paid falls under the provisions of 207(e)(5)-(7).

bargaining agreement and the statute to ensure that its employees would not suffer a reduction in their standard of living as the result of the terms of a collective bargaining agreement. Moreover, the failure to credit an employer when it has made compensation, even if it was made during a different work period, is against public policy because it discourages employers from correcting past errors. For example, if an employer discovers an accounting error from a previous period, public policy dictates that the employer should correct the error and ensure that the employee is properly compensated. If, however, the employer may be charged with a violation under the Act in any case and charged with paying that money a second or third time, it will have no incentive to make the adjustment upon discovery for fear of being mandated to make additional payments.

Furthermore, the damages awarded below are beyond the remedy provided by the statute in section 216(b), which is solely compensatory and intended to provide the employee with the funds that were due but had not been paid. 29 U.S.C. § 216(b); *Lanza v. Sugarland Run Homeowners Assoc., Inc.*, 97 F. Supp. 2d 737 (E.D. Va. 2000). If the monies due have already been paid, whether during the same work period or a later work period, and the employee has been made whole, then any requirement to pay those monies again is simply punitive. However, punitive damages are not available under this section and cannot be imported into the section from other parts of the statute because to do so would be inconsistent with the compensatory nature of the remedies provided. *Id.* The Department did not address the punitive effect of requiring HLA to pay a second and third time monies which the documents show it had paid—and its employees had received—long before the commencement of this action. Instead, the Department simply referred to the finding of liability without addressing the misapplication of § 216(b) here. Pet. Opp. 8-9.

The Department attempts to avoid the issue altogether by arguing that the stipulation between the parties prior to the commencement of the initial trial does not *expressly* state that HLA paid $529,000 in premium payments for overtime over and above the amount owed under the statute and the collective bargaining agreement. Pet. Opp. 9-10. However, the Department does not dispute that this figure is the incontrovertible result obtained by an application of the stipulated facts upon which the parties did expressly agree.[6] The court below improperly ignored the stipulation when it discounted the stipulated facts as "*assumptions* that were stipulated for trial." Pet. App. 21a (emphasis supplied).

POINT II

THE COURTS BELOW FAILED TO CALCULATE DAMAGES AS A MATTER OF JUST AND REASONABLE INFERENCE

The Court of Appeals, in its first decision, recognized that the Department's calculation of damages during the PCX period "unfairly penalizes the defendants" and that the Secretary's "actual computations of weekly hours for the PCX period" suffered from a "lack of foundation." (Pet. App. 21a n.3) On remand, the lower court and Court of Appeals did not cure the inherent deficiencies in the methodology utilized to calculate damages, and expressly rejected Petitioners' proffered statistical and economic methodologies that established a foundation for the "amount and extent of [uncompensated] work as a matter of just and reasonable inference," and that served "to negative the reasonableness of the [Department's] inference."

[6] The parties stipulated to the following facts: (1) the gross wages HLA paid to each employee; (2) the actual number of hours each employee worked; and (3) the hourly rate paid to each employee. Pet. Opp. 9-10. The amount of $529,000 is derived by using the second and third figures to calculate the amount earned by each employee and subtracting it from the gross wages each employee was paid, and the Department has never suggested otherwise.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. at 687-88. The issue here is not simply one of "erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, and thus is not precluded from review. Rather, the question is whether a damage calculation can be determined to be a matter of "just and reasonable inference" when the Court rejected the unrebutted evidence derived from accepted scientific methodologies in favor of questionable factual testimony.

The damages for the PCX period are based upon a calculation importing figures from the ADP period derived from the time clock records for that period, which the parties stipulated were accurate. The importation was based upon the witnesses' anecdotal testimony six to eight years after the fact that they worked "about the same number of hours each week" during the two periods,[7] Pet. App. 30a, even though the Court of Appeals recognized, in its first decision, that even within the same period "[t]he time-clock records demonstrate that hours tended to fluctuate from one week to the next." Pet. App. 20a.

In contrast, Petitioners offered testimony based upon statistical and economic analyses of the relevant data. Petitioners offered unrebutted evidence that HLA's business increased dramatically on an annualized basis between the PCX period and the ADP period. Before making other analyses, Petitioners' experts examined whether the increase in business had an actual effect on the amount of time each person worked in overtime during the ADP period, based upon the time clock records. Petitioners' experts demonstrated that even within the ADP period, each employee worked an average of 10% more overtime at the end of the ADP period than he or she had at the beginning of that 15 month period. This statistical analysis is further evidence that the anecdotal testimony by

[7] The record evidenced that not a single employee made any complaint that they had not been fully paid for all overtime hours worked, including the employee witnesses who testified at trial.

the Department's witnesses that they worked about the same amount of overtime throughout the time period in issue was inaccurate and unreliable, as evidenced by the concededly accurate time records for the employee witnesses.

Petitioners' witnesses applied well-accepted statistical and economic methodologies to analyze the percentage growth in the company between the PCX period and the ADP period by examining two different measures of growth: the change in annual sales figures and the change in the number of cartons of cigarettes sold each year.[8] They then applied these figures to estimate the average amount of overtime that each employee worked in each annualized period to provide a just and reasonable calculation of the amount of overtime compensation owed to employees. Petitioners' evidence adequately demonstrated that the Department's estimate of damages, based upon the employees' testimony, was rebutted by the factual and scientific evidence, was unreasonable and lacked the requisite foundation. *Reich v. Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997).

Nonetheless, the Court of Appeals improperly ignored the statistical and economic evidence before it, including the fact that the growth in the company during the ADP period directly affected the amount of overtime each employee worked from the beginning of the ADP period to the end of the ADP period, which demonstrated that the Department's failure to adjust its damages calculation to account for the growth in the company was unreasonable.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, Petitioners respectfully request that the petition for writ of certiorari should be granted.

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[8] Petitioners tested two different demand variables as a check on the measure of the company's growth and the effect on the amount of overtime required as the company grew.

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